Supreme Court, U.S.
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No. 05-15

IN THE

Supreme Court of the United States

ALBERT C. HANNA,
Petitioner,

v.

THE CITY OF CHICAGO, a Municipal Corporation,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Four questions are presented:

1. A defendant sued under 42 U.S.C. 1983 is entitled to remove such a case to the federal courts as a matter of right, under 28 U.S.C. 1441(b). Under Illinois law, as interpreted by the United States Court of Appeals for the Seventh Circuit, it is *de facto* impossible for a zoning plaintiff to maintain a claim under 42 U.S.C. 1983 in federal court. The rule of law in the Seventh Circuit is that zoning plaintiffs must exhaust their state court remedies before proceeding in federal court. The operation of these laws means that a prevailing plaintiff can never be awarded attorney's fees under 42 U.S.C. 1988, because she can never maintain her claim under 42 U.S.C. 1983 after prevailing in state court. Does this scenario deprive prevailing zoning plaintiffs in Illinois of rights, privileges and protections secured by the Fifth and Fourteenth Amendments to the United States Constitution, and enforceable under § 1983?
2. By not allowing a prevailing civil rights plaintiff to recover attorney's fees under 42 U.S.C. 1988 for work done in state court on state civil rights claims, does Illinois law violate the maxim that state due process protection cannot be less than federal due process protection?
3. Does Illinois law violate the strong public policy rationale behind the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988?
4. Do the Illinois decisions below frustrate policies of judicial comity by preventing a state court from awarding attorney's fees incurred in redressing civil rights violations for which § 1983 provides a remedy, when the federal courts can make such an award?

PARTIES TO THE PROCEEDING

The parties below are identified in the caption.

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OPINIONS BELOW

The March 30, 2005 letter from the Illinois Supreme Court denying Petitioner's Petition for Leave to Appeal is unreported. App. A. The March 7, 2005 Modified Order Upon Denial of Petition for Rehearing of the Appellate Court of Illinois, First Judicial District, affirming the opinions of the Circuit Court of Cook County, Illinois, is unreported. App. B. The July 18, 2001 Memorandum Opinion of the Circuit Court of Cook County, Illinois, Chancery Division, denying Petitioner's Corrected Petition for Attorney's Fees under § 1988 is unreported. App. C. The April 4, 2001 Memorandum Opinion and Order of the Circuit Court of Cook County, Illinois, Chancery Division, finding the downzoning of Petitioner's property to violate the substantive due process clause of the Illinois Constitution is unreported. App. D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1257.

On March 30, 2005, The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal the March 7, 2005 Modified Order Upon Denial of Petition for Rehearing, of the Appellate Court of Illinois, First Judicial District. That modified order affirmed the Circuit Court of Cook County, Illinois' denial of Petitioner's Amended Petition for Attorney's Fees, brought under 42 U.S.C. 1988. The validity of Illinois' Constitution and laws prohibiting the award of attorney's fees to prevailing civil rights plaintiffs is drawn into question as repugnant to (a) the United States Constitution, Amendments Five and Fourteen, (b) the Civil Rights Act of 1964, 42 U.S.C. 1983, and (c) the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988.

Jurisdiction is also invoked under Rules 10(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 United States Code, Section 1988

Proceedings in Vindication of Civil Rights

The provisions of 42 U.S.C. 1988 are lengthy, and are set out in App. E.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment XIV

The provisions of the Fourteenth Amendment to the United States Constitution are lengthy, and are set out in App. F.

STATEMENT OF THE CASE

A. Summary of the Underlying Case.

This case involves a prevailing civil rights plaintiff who was procedurally barred from asserting and vindicating his federal due process rights under 42 U.S.C. 1983, and thus, although victorious in state court on his state due process claims, was unable to recoup attorney's fees under 42 U.S.C. 1988—a federal protection and privilege not expressly provided for under Illinois law.

The Petitioner, Albert C. Hanna, a 74 year old private citizen and not a developer, was adjudicated the victim of an unconstitutional "downzoning" (put simply, a change in zoning from a less restrictive to a more restrictive zoning classification) of his property. At trial, Hanna pled and proved under the Illinois Constitution that the downzoning not only reduced the value and future development potential of his property, but also (a) harmed the public welfare by excluding minorities, renters, seniors and other vulnerable groups of moderate means from living in the downzoned area, and (b) was arbitrary, unreasonable and capricious because the City failed to engage in any proper planning in enacting the downzoning. The trial court, affirmed by the Illinois Appellate Court, ruled that the downzoning was neither rationally related (the federal constitutional standard) nor

substantially related (Illinois' constitutional standard) to the public welfare. App. D, p. 53a.[1]

The trial court could not reach the issue of whether the rezoning violated Hanna's federal due process rights under § 1983, since the City utilized a unique and criticized procedural tool, discussed *infra*, to force Hanna to drop the federal claims he originally pled, and thus avoid the specter of paying attorney's fees under § 1988. First, the City removed the case to the United States District Court for the Northern District of Illinois under 28 U.S.C. 1441(b). Next, citing dispositive authority from the United States Court of Appeals for the Seventh Circuit, *River Park v. City of Highland Park*, 23 F. 3d 164, 165 (7th Cir. 1994), which holds that zoning plaintiffs in Illinois must pursue their claims in Illinois' state courts before bringing a claim in federal court, moved to dismiss Hanna's complaint. Faced with the outright dismissal of his complaint under *River Park*, Hanna dropped his federal claims, and the case was remanded to the Circuit Court of Cook County, Illinois, where he ultimately prevailed on his Illinois substantive due process claims.

After prevailing in state court, Hanna did file a petition for attorney's fees under § 1988. The trial court, affirmed by the Illinois Appellate Court, denied the petition on the grounds that Hanna had not pursued and prevailed upon a claim brought specifically under § 1983 (although Hanna originally asserted claims under § 1983).[2] The Illinois Supreme Court denied Hanna's petition for leave to appeal the Illinois Appellate Court decision. The issue of whether a prevailing civil rights plaintiff in Illinois is entitled to recoup attorney's fees

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[1] References to the attached Appendix will be to the letter designation of the appropriate appendix, and the page number(s) on which the cited reference appears, *e.g.* "App. B, p. 20a."

[2] The trial judge who heard Hanna's case on the merits, Hon. Sidney A. Jones, III, retired on April 5, 2001. He was replaced for hearing on Hanna's fee petition by the Hon. Sophia H. Hall.

under § 1988 is one of first impression in Illinois. Left undisturbed, Illinois law is in conflict with holdings of the First, Fifth, Sixth and Ninth Circuit U.S. Courts of Appeal, and the law of the states of Tennessee, Nebraska, Minnesota, California, Louisiana and Indiana.

B. Presentation of the Federal Questions in the State Court.

Hanna first raised the federal questions involved in this Petition when he filed his original complaint on October 28, 1997. Therein, he alleged specific violations of 42 U.S.C. 1983. App. C, p. 37a.

On March 14, 2001, the trial court advised the parties that it intended to rule for Hanna on his substantive due process claims. On March 26, 2001, Hanna filed a Petition for Attorney's fees, specifically requesting fees under § 1988. App. C, p. 38a. The trial court's Memorandum Opinion and Order ruling for Hanna was entered on April 4, 2001. App. D. On May 4, 2001, Hanna filed his Corrected Petition for Attorney's Fees, again requesting an award of fees under § 1988. App. C, p. 38a. On July 18, 2001, the trial court denied Hanna's Corrected Petition. App. C. The trial court held, in pertinent part, "For the foregoing reasons, this Court holds that Hanna is not entitled to recover § 1988 attorney's fees because Hanna did not prevail on a federal constitutional claim when this court found against the City for violation of his state substantive due process rights. Therefore, this Court denies Hanna's petition for attorney's fees." App. C, p. 41a.

On August 14, 2001, the City of Chicago filed its Notice of Appeal from the orders of the Circuit Court of Cook County, Illinois. On August 16, 2001, Hanna filed his Notice of Cross Appeal, specifically appealing, *inter alia*, the trial court's July 18, 2001 denial of his Corrected Petition for Attorney's Fees. On June 1, 2004, the Illinois Appellate Court affirmed the trial court's denial of Hanna's fee request. On June 21, 2004, the City filed a

Petition for Rehearing in the Illinois Appellate Court, seeking rehearing on the underlying substantive zoning issues.

On June 22, 2004, Hanna filed a Petition for Leave to Appeal in the Illinois Supreme Court, seeking review of the Illinois Appellate Court's affirmance of the trial court's denial of his Corrected Petition for Attorney's Fees. Hanna's Petition was stayed pending resolution of the City's Petition for Rehearing. On March 7, 2005, the Illinois Appellate Court issued its Modified Order Upon Denial of Petition for Rehearing. App. B. The Illinois Appellate Court held, in pertinent part:

> The only statue Hanna identifies is the federal act, § 1998 [sic], indicating that the court has discretion to award a prevailing plaintiff attorney fees in an action brought under certain federal acts, including § 1983. . . . However, federal law was not a basis for the judgment entered in Hanna's favor, and although Hanna's initial complaint included federal claims, he abandoned them by amending his action in order to return to state court. App. B, pp. 33a-34a.

On March 30, 2005, the Illinois Supreme Court issued a letter advising the parties that on that day the Illinois Supreme Court denied Hanna's Petition for Leave to Appeal. App. A. This Petition follows.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Illinois Supreme Court Has Left Undisturbed an Important Federal Question that Conflicts with the Decisions of Other State Courts of Last Resort and United States Circuit Courts of Appeal.

The issues presented in this case go to the heart of the federal privileges and protections embodied in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. That Hanna is a victim of a civil rights violation for which § 1983 provides redress is not in issue. He was. The very same set of facts that proved the downzoning of his property violated his Illinois substantive due process rights would have showed that

the downzoning violated his federal due process rights, if only unique procedural maneuverings would not have forced him to drop his federal claims, and left him with no avenue under Illinois law to recover attorney's fees. In fact, the trial judge ruled that the downzoning not only flunked Illinois' "substantial relationship test," but also the federal "rational basis" test applied in § 1983 proceedings. Hanna still could have recovered his nearly $1,000,000.00 in attorney's fees and expert costs (twice his lost property value resulting from the downzoning) if only Illinois law recognized, as other states and federal courts of appeal have, that Hanna alleged and prevailed on facts stating a cognizable claim under § 1983, and thus should be permitted to recover his fees under § 1988 for work done in state court on state claims.

So, the federal question presented is whether a plaintiff who proves a cognizable claim under § 1983, but is forced to do so under state law, should be awarded the attorney's fees he would be otherwise entitled to recover under § 1988 had he been allowed to maintain his § 1983 claims. The importance of this federal question cannot be overstated. This Court, citing to Congress's intent as embodied in the legislative history of § 1988, has made it abundantly clear that the recovery of attorney's fees in civil rights cases is essential to enforcement of this Country's civil rights laws. *See City of Riverside v. Rivera*, 477 U.S. 561, 573, 106 S.Ct. 2686, 2694 (1986) ("Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.' [citation to H.R. Rep. No. 94-1558, p. 2]) 'If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen suffers.' 122 Cong.Rec. 33313 (1976) (remarks of Sen. Tunney)"); *Smith v. Robinson*, 468 U.S. 992, 1006, 104 S.Ct. 3457, 3465 (1984) ("As the legislative

history illustrates and as this Court has recognized, § 1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. [citations omitted].").

Moreover, this Court has repeated that a prevailing civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966 (1968).

Hanna sought to vindicate his federal constitutional and statutory rights. The operation of Illinois law and the absence of either a fee award statute or Illinois authority authorizing an award of attorney's fees, however, prohibited Hanna from enjoying the federal privileges and protections he *should* have enjoyed under §§ 1983 and 1988. Both this Court, *Mills v. Rogers*, 457 U.S. 291, 300, 102 S.Ct. 2442, 2448-49 (1982), and Illinois courts, *Louis E. v. Spagnolo*, 287 Ill. App. 3d 822, 835, 679 N.E. 2d 831, 840 (5th Dist. 1997), *aff'd in part, rev'd in part on other grounds*, 186 Ill. 2d 198, 227, 710 N.E. 2d 798, 812 (1999), recognize the maxim that rights provided under the Federal Constitution define only a minimum, and that the states are free to provide more, but not less, protection and liberty interests. The Illinois decisions below violate this important principle of constitutional law.

1. ***The Illinois decisions below are in conflict with several state courts, which allow recovery of § 1988 attorney's fees for work done in state court on state claims where the complaint alleges facts stating a federal claim.***

Several state courts of last resort recognize that attorney's fees incurred for work done in state court under state law to vindicate federal rights protected under § 1983 should be recoverable under § 1988. The Supreme Court of Tennessee has twice awarded attorney's fees under § 1988 in state court proceedings where the prevailing plaintiff neither pled nor

relied upon § 1983. *Bloomingdales by Mail, Ltd. v. Huddleston*, 848 S.W.2d 52, 56 (Tenn. 1993); *Wimley v. Rudolph*, 931 S.W.2d 513, 517 (Tenn. 1996). The Supreme Court of Nebraska, in *Maldonado v. Nebraska Dept. of Public Welfare*, 223 Neb. 485, 489, 391 N.W.2d 105, 108-109 (Neb. 1986), found that even though the state court plaintiff gave no notice of a § 1983 claim in either her petition or in open court, she alleged facts that would support a § 1983 claim, and awarded fees under § 1988. Similarly, the Minnesota Supreme Court awarded § 1988 attorney's fees for work done in state court where the plaintiff failed to specifically plead under § 1983 and prevailed solely on state law grounds, but the facts alleged supported a § 1983 claim. *L.K. v. Gregg*, 425 N.W.2d 813, 820 (Minn. 1988).

In *Stanton v. Godfrey*, 415 N.E. 2d 103, 107-108 (Ind. Ct. App. 1981), the Court of Appeals of Indiana awarded § 1988 attorney's fees to a state court plaintiff who asserted and prevailed on only state court claims. That case is important because the plaintiff did not assert § 1983 claims in state court because she had already prevailed on her constitutional claims in federal court, but was only entitled to prospective injunctive relief against the State, under *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974). The Indiana Appellate Court nevertheless recognized that the plaintiff had stated facts supporting a § 1983 claim, as Hanna did in the trial court below. Likewise, in *Rowan Companies, Inc. v. Louisiana State Tax Comm'n*, 623 So.2d 159, 162 (La. Ct. App. 1993), although the plaintiff prevailed solely on state law grounds and the trial court never reached the constitutional issues, the Louisiana Court of Appeals held that the plaintiff *implicitly* had proved a constitutional violation, and reversed the trial court's denial of attorney's fees. Finally, California's appellate courts have awarded § 1988 attorney's fees in state court proceedings wherein § 1983 violations were not alleged but the facts contained in the complaint stated a federal constitutional claim. *Best v. California*

Apprenticeship Council, 193 Cap.App.3d 1448, 1463-1465 (Cal. Ct. App. 1987). The foregoing Indiana, Louisiana and California cases do not emanate from courts of last resort, however their holdings are the law of those states and this Court should consider them.

2. *The decisions below are in conflict with several federal courts of appeal which allow recovery of § 1988 attorney's fees for work done in state court on state claims.*

Several United States Circuit Courts of Appeal have held that prevailing civil rights plaintiffs should be entitled to recover § 1988 attorney's fees for work done in state court on state law claims. In *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982), plaintiffs' complaint was originally filed in federal court, but the defendants forced plaintiffs to state court for resolution of solely state law claims, invoking *Pullman*. Ultimately, the plaintiffs prevailed in federal court, and sought § 1988 attorney's fees for the work done in state court on the state law claims. The district court awarded fees. The Ninth Circuit affirmed because defendants forced plaintiffs to state court in the first place, holding, "If we were to adopt state appellant's sophistic claim that 42 U.S.C. § 1988 is inapplicable because the proceedings in the state court were not brought to enforce rights guaranteed by section 1983, justice would truly be blinded from appreciation of reality." *Id.* at 912.

Similarly, in *Exeter-West Greenwich Regl. Sch. Dist. v. Pontarelli*, 788 F.2d 47 (1st Cir. 1986), the plaintiffs filed their federal claims in federal district court. The district court, *sua sponte*, certified a dispositive state law question to the Rhode Island Supreme Court. The Rhode Island Supreme Court ruled in favor of plaintiffs. The district court then dismissed plaintiffs' federal claims as moot, but awarded them § 1988 fees for the work done in state court. *Id.* at 51-52. The First Circuit affirmed, citing

Bartholomew, and relying upon the comity issues between the state and federal court systems, discussed *infra*.

In *Americans United for Separation of Church & State v. School District of the City of Grand Rapids*, 835 F.2d 627 (6th Cir. 1987), the district court found that plaintiff had chosen to proceed solely under the federal Declaratory Judgment Act, and had thus forgone its right to proceed under § 1983 and recover fees under § 1988. *Id.* at 629. The Sixth Circuit reversed, holding that, "The mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorney's fees if the pleadings and evidence do present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy, and this claim is related to the plaintiff's ultimate success." *Id.* at 631. *Americans United's* ultimate holding, that the substance of the pleadings should determine whether plaintiff has pled a claim for which § 1983 provides a remedy, is in conflict with the Illinois courts below. Hanna's complaint and trial proofs stated and proved a claim for which § 1983 provides a remedy.

Finally, the Fifth and Ninth Circuit Courts of Appeal have announced a somewhat different, but important, legal principle that bears on whether the Illinois decisions below violate federal constitutional protections. In *Spain v. Mountanos*, 690 F. 2d 742 (9th Cir. 1982), the Ninth Circuit considered a case in which a § 1988 fee award had been granted, but the state Controller did not issue the warrant for fees. The State raised Eleventh Amendment defenses. In affirming the district court's award of fees and ordering payment, the Ninth Circuit, citing the Fifth Circuit's decision in *Gates v. Collier*, 616 F. 2d 1268, 1272 (5th Cir. 1980), held, "We agree with the Fifth Circuit that a state cannot frustrate the intent of section 1988 by setting up state law barriers to block enforcement of an attorney's fee award." *Spain*, 690 F.2d at 746. In the case bar, the State of Illinois has erected barriers to Hanna's recovery of § 1988 attorney's fees.

The holdings of the Illinois courts below are in conflict with three state courts of last resort and four United States Circuit Courts of Appeal, and are contrary to this Court's pronouncement that prevailing civil rights plaintiffs should ordinarily recover attorney's fees. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966 (1968).

B. The Illinois Courts Have Decided an Important Question of Federal Law that Frustrates Judicial Comity, and Should be Settled by the Supreme Court of the United States.

Whether recovery of attorney's fees as a method to enforce the Nation's civil rights laws is important is beyond legitimate debate. As demonstrated in the preceding section, in resolving this case Illinois courts have created conflict between it and (a) at least three state courts of last resort, and (b) several United States Circuit Courts of Appeal. For this reason alone, the United States Supreme Court should grant Petitioner's Writ to resolve that conflict.

A second critical reason this Court should settle the issue at bar is one of judicial comity. A primary rationale underpinning the holdings of *Bartholomew* and *Exter-West*, discussed *supra*, is that judicial comity would be frustrated if courts could not award attorney's fees in civil rights cases for work done in state court on state law issues. *Bartholomew* supports Hanna's argument that the comity of the justice system would be frustrated and judicial resources would be wasted if Hanna were forced to somehow proceed in federal court on his federal constitutional claims—after he already won in state court—in order to receive an award of attorney's fees under § 1988.[3]

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[3] In fact, principles of mootness, *res judicata* and claim and/or issue preclusion would most likely prevent Hanna from ever being able to maintain a § 1983 claim in federal court after he was already granted the underlying zoning relief he sought in state court.

In addressing the comity issue, the Ninth Circuit stated:

> If we were to hold that legal work done in a state court to vindicate rights recognized under section 1983 could not be compensated, serious strains between the state and federal court systems might develop....[t]his double standard of awarding attorneys' fees would encourage forum shopping and interfere with efficient allocation of issues and cases between the state and federal systems.

Bartholomew, 665 F. 2d at 913. Forum shopping is exactly what the City did in the case at bar.

The *Exeter-West* court reached the same conclusion. In its holding, the First Circuit cited *Bartholomew* and agreed that if fees are not allowed for work performed in state court proceedings when the district court abstains from a § 1983 claim, "serious strains between the state and federal court systems might develop." *Exeter-West*, 788 F.2d at 51. The court's abstention is analogous to the Seventh Circuit refusing to hear zoning cases until the zoning grievance is litigated in state court first. In both instances, the plaintiff is forced into state court without his parallel federal claim, and in this case, Hanna has no real possibility of returning to federal court. Recognizing the need for comity and fairness in the judicial system, the *Exter-West* court held that attorney's fees under § 1988 may be awarded for work done in state court proceedings—even when the § 1983 claim was not adjudicated and subsequently found to be moot in view of the state court decision. *Exeter-West*, 788 F.2d at 51.

State courts should be allowed to hear and resolve § 1983 claims, over which they have concurrent jurisdiction, *Maine v. Thiboutot*, 448 U.S. 1, 3, n. 1, 100 S.Ct. 2502, 2503, n. 1 (1980), and award prevailing parties their § 1988 attorney's fees. The Illinois decisions below frustrate fundamental principles of judicial comity. This Court should settle the issues presented herein in aid of judicial comity in our Nation's court system.

ARGUMENT

Since 1971, the City of Chicago has been engaged in a pattern or practice of implementing land-use controls that have had a devastating effect on the affordability, and thus availability, of decent housing for minorities, seniors, single persons, and other vulnerable groups of moderate means who typically rent. In fact, Hanna views it as no coincidence that the City began utilizing land-use controls in white, high income neighborhoods to restrict housing availability for minorities and others of lesser means in the immediate wake of the landmark *Gautreaux* decisions, which mandated that the Chicago Housing Authority stop clustering minorities in less advantaged areas of the City. *See e.g. Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F. 2d 306 (7th Cir. 1971), *cert. denied*, 402 U.S. 922, 91 S.Ct. 1378 (1971); *Gautreaux v. Romney*, 363 F.Supp. 690 (N.D. Ill. 1973), *rev'd sub nom. Gautreaux v. Chicago Housing Authority*, 503 F. 2d 930 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538 (1976). It is also noteworthy that Hanna brought his first legal challenge to such practices in 1971, the year the City passed an ordinance effectively eliminating the ability to develop apartment buildings, known as four-plus-ones, where minorities and others of moderate means were able to afford market-rate rent, and thus attempt to elevate themselves out of Chicago's notorious ghettos. Hanna brought this case to not only vindicate his rights, but correct a grave social injustice that adversely affects him, his neighborhood, and the City as a whole.

It is an anomaly that Hanna has the means sufficient to afford counsel in order to pursue his civil rights claims, and prevail. As the legislative history behind the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, unambiguously states, the rationale behind § 1988 is to encourage citizens *without* means, whose civil rights have been violated, to pursue vindication of those rights. *See City of Riverside v.*

Rivera, 477 U.S. 561, 573-581, 106 S.Ct. 2686, 2694-2687 (1986), and extensive congressional intent and legislative history cited therein. In short, this Petition presents the opportunity for this Court to determine that minorities, seniors, single persons, and other vulnerable groups of moderate means who try, but are procedurally blocked, from recovering fees under § 1988, may still avail themselves of the privileges and protections of the Fifth and Fourteenth Amendments, the enforcement mechanism of § 1983, and the remedies of § 1988. Hanna spent almost $1 million vindicating his due process rights. Should this petition be denied, it is likely that this important issue will never be properly adjudicated, as those who need §§ 1983 and 1988 the most will never be able to properly present this issue to this Court.

A. Facts Germane to the Petition.

On October 28, 1997, the City Council for the City of Chicago enacted a "downzoning" amendment (put simply, a change in zoning from a less restrictive to a more restrictive classification) which rezoned a 9-block area within Chicago's Lincoln Park neighborhood (the "Downzoning"). Hanna's property was subject to the Downzoning. App. B, p. 2a.

The City conducted no studies or analyses of whether or not residential downzoning is good or bad, or how it should be accomplished. App. B, p. 16a. Neither the City's Department of Planning nor the Department of Zoning requested the Downzoning. App. D, p. 48a. In rendering their statutorily required recommendations regarding passage of the Downzoning, both the Zoning Administrator and the Commissioner of the Department of Planning made "no recommendation," and requested that the Downzoning be deferred for further study. App. B, p. 30a. The City did not pass the Downzoning pursuant to any comprehensive plan, as it in fact does not have one. App. B, p. 26a; App. D, p. 53a. The City did not defer the Downzoning for further study; it was passed by the

Committee on Zoning on February 20, 1997, the same day deferral was requested. This was the result of the notorious practice of "Aldermanic Rule" in the City of Chicago.

The Downzoning caused many negative social effects, including exclusionary effects on minorities, working-class people, and senior citizens, as well as a loss in the employment and tax bases. At trial, Hanna demonstrated the following ill-effects of downzoning:

- Downzoning reduces population and drives up housing costs. App. B, p. 17a.
- Middle income people could no longer afford to live in Lincoln Park. *Id.*
- Between 1980 and 1990 Lincoln Park's minority population decreased by 39%. App. B, p. 18a.
- Downzoning disproportionately increases housing costs adversely affecting those of moderate means who live or want to live in the subject area. App. B, p. 30a; App. D, p. 48a.

Hanna, with more than 40 years experience in the real estate industry, testified that, "[the] City has got to study and analyze its responsibilities to the future housing needs of [its] citizens." App. B, p. 20a. Hanna also testified as to the disappearance of minorities, workers, and other lower income groups from his community as housing costs spiraled upwards in Lincoln Park. *Id.* Had Hanna not challenged the Downzoning and obtained a finding of its invalidity, the negative social effects likely would have continued unabated.

On January 30, 1998, Hanna filed his initial complaint in state court, alleging that the Downzoning violated his state and federal constitutional rights. App. C, p. 37a. The City then removed the case to the United States District Court for the Northern District of Illinois. *Id.* Once in federal court, the City moved to dismiss the case, citing, *inter alia*, *River Park v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals. * * *

Litigants who neglect or disdain their state remedies are out of court, period."); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 578 (7th Cir. 1990) ("[t]his court is not a zoning board of appeals"); *Coniston v. Corp. v. Village of Hoffman Estates*, 844 F. 2d 461, 467 (7th Cir. 1988) ("[t]his case represents a garden-variety zoning dispute dressed up in the trappings of constitutional law"). App. C, p. 37a. Faced with the dispositive instruction of *River Park* (discussed *infra*), Hanna filed an amended complaint which omitted his federal claims. The district court remanded the case to the Circuit Court of Cook County upon Hanna's motion, to proceed on the state claims. *Id.*

On April 4, 2001, after a bench trial lasting several weeks, the circuit court, Hon. Sidney A. Jones, III, ruled that the Downzoning violated Hanna's Illinois substantive due process rights, using the "substantial relationship" test applied under Illinois law. App. D, pp. 53a-54a. The trial court held that the Downzoning also failed the "rational basis" test used in federal constitutional claims under 42 U.S.C. § 1983. *Id.* at 53a. On July 18, 2001, a different trial judge, Hon. Sophia H. Hall, ruled on Hanna's Corrected Petition for Attorney's Fees, holding that Hanna was not entitled to recover § 1988 attorney's fees. App. C. On June 1, 2004, and again on March 7, 2005, the Appellate Court affirmed both of the trial court's rulings. App. B.

B. Hanna Pled and Proved a Cognizable Claim under § 1983.

To state a claim under § 1983, a plaintiff must satisfy two jurisdictional requirements. First, he must allege violation of a right secured by the Constitution and laws of the United States. Second, he must allege that the deprivation was caused by a person acting "under color" of law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 946, 102 S.Ct. 2744, 2758 (1982). Hanna's original complaint alleged a specific violation of § 1983. App. C, p. 37a. Further, Hanna's com-

plaint unquestionably alleged facts demonstrating, and he ultimately proved, that the City violated his substantive due process rights in enacting the Downzoning. The sufficiency of Hanna's allegations and proofs simply are not in issue.

In fact, the trial court specifically held that Hanna proved that the Downzoning was neither *substantially related* (the Illinois constitutional standard), nor had a *rational basis* (the federal, § 1983 standard) related to a legitimate public interest, and that it was arbitrary, unreasonable and capricious. App. D, pp. 53a-54a. The exact same nucleus of operative facts and evidence supports both holdings. Thus, the trial court found that Hanna satisfied both standards, and that the City explicitly violated Hanna's Illinois, and implicitly violated Hanna's federal, guarantees of due process. Under *Americans United,* and the line of state court cases cited in the "Reasons for Allowance of the Writ" section, *supra*, the fact that Hanna could not plead and pursue a § 1983 claim should be of no moment. He pled and proved facts establishing a cognizable claim under § 1983.

1. *The Illinois courts below failed to provide Hanna with minimum federal due process protection.*

Under both Illinois and federal law, constitutional "protection" at the state level should not be, and in fact cannot be, less than at the federal level. *Mills v. Rogers*, 457 U.S. 291, 300, 102 S.Ct. 2442, 2448-49 (1982); *Louis E. v. Spagnolo*, 287 Ill. App. 3d 822, 835, 679 N.E. 2d 831, 840 (5th Dist. 1997), *aff'd in part, rev'd in part on other grounds*, 186 Ill. 2d 198, 227, 710 N.E. 2d 798, 812 (1999). The fact that the trial court found that the City violated Hanna's due process rights under the federal "rational basis" standard compels the conclusion that Hanna is entitled to *at least* the same "protections" to which he would be entitled under § 1983, which include attorney's fees under § 1988.

The appellate and trial courts' denial of Hanna's petition for attorney's fees and costs appears to stem from an erro-

neous belief that state substantive due process rights are not the same rights as federal substantive due process rights. However, the due process rights *are* the same; they are simply protected by two different guarantees involving differing standards. The court in *Rowan Cos., Inc. v. Louisiana State Tax Comm'n*, 623 So.2d 159, 162 (La. App. Ct. 1993), recognized that state and federal due process rights are the same, holding that federal and state due process claims are proven by the same set of facts and, "the legal principles controlling both claims are essentially identical." *Id.*

Illinois courts likewise have recognized the "sameness" between Illinois and federal due process protections. In *Spagnolo*, the court went one step further, recognizing that states can go *beyond* the protections of the federal constitution:

> The Illinois guarantee of due process stands separate and independent from the federal guarantee of due process, *but the Illinois provision offers at least the same level of due process protection as that provided by the United States Constitution*, and our courts are free to find that the Illinois Constitution provides *greater protection* than does the federal constitution.

Louis E. v. Spagnolo, 287 Ill. App. 3d 822, 835, 679 N.E. 2d 831, 840 (5th Dist. 1997), *aff'd in part, rev'd in part on other grounds*, 186 Ill. 2d 198, 227, 710 N.E. 2d 798, 812 (1999) (emphasis added).

A careful reading of the above language shows that Illinois citizens have separate "guarantees" of due process under both the Illinois and Federal Constitutions. Those guarantees are separate and independent because they arise out of separate laws. However, the due process protections provided under each Constitution are, at a minimum, the same with the state level of protection allowed to be greater, but not less.

If Illinois law did not allow for recovery of attorneys' fees for successful civil rights claimants, as the Illinois courts below erroneously held, the identity of protections *Spagnolo*

recognizes is obliterated. Here, the Illinois courts below gave Hanna one *less* degree of protection under the Illinois Constitution than he would have received under the U.S. Constitution, by rejecting his claim to attorneys' fees.

2. *Section 1988's remedies amount to due process protection.*

Hanna does not quibble with the basic proposition that § 1988 is a remedial statute that confers no substantive rights. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2255 (1988). However, as both Congress and this Court have recognized, without remedies, the substantive rights conferred by underlying laws are empty. In the civil rights arena, the remedy of attorney fee recovery is a form of "protection" associated with § 1983, and the due process clause of the Constitution.

The Senate Report on § 1988 confirms the interconnection between enforcement of our civil rights laws and the award of attorney's fees. Several comments from that report are enlightening:

> In cases under these laws [allowing for an award of attorney's fees], fees are an integral part of the remedy necessary to achieve compliance with our statutory policies.
>
> * * *
>
> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture.* * * *Hall v. Cole*, 412 U.S. 1 (1973), quoting 462 F. 2d 777, 780-81 (2nd Cir. 1972).
>
> * * *
>
> The remedy of attorney's fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorney's fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest

> and most effective remedies available to achieve the goals of our civil rights laws.
>
> * * *
>
> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance.
>
> * * *
>
> If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must retain the traditionally effective remedy of fee shifting in these cases.

S. Rep. 94-1011, 1976 U.S.C.C.A.N. 5908, pp. 3-6.

Senator Kennedy, speaking on the Senate floor regarding The Civil Rights Attorney's Fees Awards Act of 1976, stated:

> It is a fundamental axiom of law that where there is a right the law should provide a remedy. Yet, without a provision to permit awards of attorney's fees to successful parties, the rights secured by those civil rights laws covered by this act are hollow rights indeed.

122 Cong.Rec. S16252 (daily ed. Sept. 21, 1976).

This Court has echoed the policy rationales underlying § 1988. *See Smith v. Robinson*, 468 U.S. 992, 1006, 104 S.Ct. 3457, 3465 (1984); *City of Riverside v. Rivera*, 477 U.S. 561, 577, 106 S.Ct. 2686, 2696 (1986) (recognizing the courts' broad grant of authority to award § 1988 fees and the important civil rights enforcement policies underlying the Act).

Hanna understands that § 1988 does not confer substantive rights. It is true, however, that without the remedies available under § 1988, the rights and protections he should receive under the due process clause of the Constitution, enforceable through § 1983, is no real protection at all. The very laws

enacted to protect persons such as Hanna are indeed hollow should this Court not grant the instant Petition and address this critical gap in the enforcement of our civil rights laws. Without the remedy provided under § 1988, Hanna has lost his constitutionally guaranteed civil rights.

C. The City Uses a Procedural Whip-Saw to Force Zoning Plaintiffs to Drop Their § 1983 Claims.

The Illinois courts below denied Hanna's fee petition in part on the basis that he voluntarily withdrew his federal due process claim in federal court. App. B, 34a; App. C, pp. 37a, 41a. This reasoning is flawed. Hanna initiated this case in state court. His complaint properly included both federal and state constitutional claims, as state courts have concurrent jurisdiction over § 1983 claims. The City removed the case to federal court. Once there, Hanna did not happily choose to drop his federal claims; rather, he was forced to do so under, *inter alia*, *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994). *River Park* mandates that zoning plaintiffs take their grievances to state court first. As Judge Easterbrook succinctly stated:

> Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; *none has ever prevailed in this circuit*, but state courts often afford relief on facts that do not support a federal claim. Is it that they have omitted the steps necessary to obtain review in state court and hope for the best in a second-chance forum? Well, we are not cooperating. Litigants who neglect or disdain their state remedies are out of court, period.

Id. at 165 (emphasis added). *See also Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 578 (7th Cir. 1990) ("[t]his court is not a zoning board of appeals"). The dictates of *River Park* are still the law in the Seventh Circuit. *See Patel v. City*

of Chicago, 383 F. 3d 569, 574 (7th Cir. 2004) ("Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court," quoting *River Park*, 23 F. 3d at 167).

The City uses cases such as *River Park* to place zoning plaintiffs like Hanna in a "catch-22." When a zoning case is filed in state court with both state and federal constitutional claims properly pled, the City removes the case to federal court. Ironically, after it forces the plaintiff into federal court, it then files a motion to dismiss the federal claims on the basis that under *River Park* or *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985), the federal claims are not ripe, and cannot become so until the plaintiff has exhausted all of his state claims in state court. This leaves the zoning plaintiff unwittingly heading back to state court with only his state claims intact. That is what happened to Hanna in this case.

The system is rigged. The City is aware of this and uses it to its advantage to avoid the specter of paying claimants' attorneys' fees. A zoning plaintiff cannot plead a § 1983 claim in state court, lest he or she be removed to federal court—only to have the § 1983 claim dismissed. A victorious state zoning plaintiff is left without § 1988 protections and can never assert § 1983 claims in federal court (to recover § 1988 fees) because he or she has already "won." This paradox is simply wrong.

The federal judiciary has chided the City's knee-jerk practice in this regard. Judge Wayne R. Andersen's opinion in *Midwest Partners v. City of Chicago*, 2001 WL 1329306 (N.D. Ill. 2001) is instructive here:

> This is a zoning case filed to invalidate a zoning ordinance. Midwest challenges the City's rezoning from R6 to R2 of its property. The Seventh Circuit has made it clear that '[f]ederal courts are not boards of zoning appeals.' *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) 'Labels do not matter. A

> person contending that state or local regulation of the use of land has gone overboard must repair to state court.' *River Park*, 23 F.3d at 167. In this case, Midwest did repair to state court, the City removed the case here, and now we must send the case back to state court.
>
> The City complicated this case procedurally by removing it to this Court. As originally filed, and in its current form, the case contained both state and federal claims, which the state court was fully competent to handle. Instead of letting the state court resolve the zoning challenge as it should, the City reflexively removed the case to this Court and then moved to dismiss the federal claims, asserting that Midwest should have gone to state court first before seeking federal relief. That, of course, is what Midwest did.
>
> Judge Shadur has admonished the City for the "serious mistake" of responding "in Pavlovian fashion by filing a notice of removal (the legal equivalent of salivation by Pavlov's dogs) every time that the bell of potential removability has been rung." *Badanish v. City of Chicago*, 895 F.2d 201, 203 (N.D. Ill. 1995). In cases that will involve construction and application of state law, he advised the City that it might be better if it "had simply left things where they were, with the case pending before a state court that was fully competent to address state law issues and federal constitutional issues alike." *Id. at 203*.
>
> Because all issues will necessarily be impacted by the Circuit Court's resolution of the zoning claims, and because important state interests in the zoning area are at stake, we remand this case to the state court for resolution of the claims.

Of course the City has no intention of heeding Judges Andersen's and Shadur's advices. Its Pavlovian response, unabated to date, stems from the knowledge that it can avoid paying attorney's fees for its unconstitutional acts so long as it engages in its procedural maneuverings. And, there appears nothing the federal judiciary can do about this absent inter-

vention from a higher court. This Court should grant the instant Petition to right this manifest injustice—an injustice that frustrates the very essence of our civil rights laws.

D. The Illinois Decisions Below are in Conflict with the Laws of its Sister States and United States Circuit Courts of Appeal.

In the preceding "Reasons for Acceptance of the Writ" section, Petitioner identifies state and federal court decisions awarding attorney's fees for work done in state court on issues of state law. Those decisions are based primarily on principles of equity—fees should be awarded if the facts alleged support a civil rights claim under § 1983—and comity—tension between the federal and state judicial systems would arise if state courts cannot provide the same remedies for a violation of § 1983 that federal courts can. A few of those decisions require elaboration.

1. *State courts award § 1988 attorney's fees for work done under state law so long as the allegations support a claim under § 1983.*

The Supreme Court of Tennessee has twice awarded attorney's fees incurred for work done in state court under state law to vindicate federal rights protected under § 1983. In both cases the prevailing plaintiff neither pled nor relied upon § 1983. In *Bloomingdales by Mail, Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1993), a nonresident tax payer sued the State's Tax Commissioner challenging Tennessee's state use tax statue. No federal claims were pled. The tax payer prevailed and requested attorney's fees under § 1988. In deciding to award fees, the court first reviewed an extensive body of law on the issue of § 1988 fee awards, including *Spain v. Mountanous, Americans United for Separation of Church and State v. School District of the City of Grand*

Rapids, and *L.K. v. Gregg, supra*. Having considered those cases, the Tennessee Supreme Court held:

> Pursuant to the foregoing authority, a state court that has subject matter jurisdiction may not deny a party to such proceeding its federal rights. These Federal rights include rights under the Commerce Clause of the U.S. Constitution. If the party enforcing such rights is successful, that party is entitled to receive an award of attorneys' fees under 42 U.S.C. § 1988, even though that party did not specifically plead or rely on 42 U.S.C. § 1983 in prosecuting its claim.

848 S.W.2d 52 at 56. This rationale applies here. Even though Hanna could not specifically plead or rely on § 1983, his federal substantive due process rights were violated. He should be entitled to fees under § 1988.

In *Wimley v. Rudolph*, 931 S.W.2d 513 (Tenn. 1996), the plaintiff elected and received state administrative review of the termination of her Aid for Dependent Children benefits. Under Tennessee law, she was precluded from filing a § 1983 claim if she sought and received the remedies available under administrative review. *Id.* at 515. Nonetheless, the Tennessee Supreme Court ruled that she was entitled to § 1988 fees since her claim for AFDC benefits stated a cognizable claim under § 1983. *Id.* at 516. In language applicable to the case at bar, the Tennessee Supreme Court held:

> Here, the basis for plaintiff's petition for judicial review was her allegation that DHS had denied her rights afforded under federal law, specifically rights to AFDC benefits. Upon prevailing upon that claim, plaintiff had, by definition, established a deprivation of rights under color of state law, the very basis for recovery under Section 1983. Furthermore, that success entitled her to attorney fees under Section 1988 even had she not plead that entitlement. *Bloomingdale's by Mail Ltd. v. Huddleston*, 848 S.W.2d at 56.

931 S.W.2d at 516. *Wimley* is similar to the case at bar. The plaintiff there *was prohibited* under Tennessee law from

bringing a § 1983 claim. So too was Hanna in Illinois. When Hanna prevailed upon his state due process claims, however, he too prevailed upon a claim that by definition established a deprivation of rights under color of state law. He should thus be permitted to avail himself of the privileges and remedies of §§ 1983 and 1988.

Stanton v. Godfrey, 415 N.E. 2d 103 (Ind. Ct. App. 1981), is also factually similar to the case at bar. In that case, the plaintiff first prevailed on constitutional claims in federal court challenging the State of Indiana's withholding of child welfare benefits. She could only obtain prospective relief in that suit, however, under *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974). After plaintiff prevailed on her federal claims in federal court, she filed state tort and contract claims in state court for her past damages. Despite the fact that she asserted no federal claims in her state court complaint, the Court of Appeals of Indiana awarded § 1988 attorney's fees to her because that court recognized that she had stated facts supporting a § 1983 claim in her complaint. 415 N.E. 2d at 107.

These state cases, and those cited in the "Reasons for Acceptance of the Writ," *supra*, demonstrate that substance must trump procedure when it comes to enforcement of our Nation's civil rights laws. Hanna too is entitled to the important federal privileges and remedies embodied in § 1988.

2. *Federal Courts of Appeal award § 1988 attorney's fees for work done in state court on state law claims.*

The holding of *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982) contradicts the notion that a claimant must plead and prosecute a federal claim in state court before § 1988 fees will be awarded. In *Bartholomew*, the plaintiffs initially filed in federal court constitutional challenges to certain practices of the Oregon State Corrections Division. In response, and similar to this case, the state appellant sought and obtained a *stay* of the federal case, under *Pullman*, and *forced* the

plaintiffs into state court to adjudicate solely state law claims. *Id.* at 912. The appeals court noted that the state court suit was "initiated and pursued [by the state appellant] solely because of the filing of the section 1983 civil rights claim in the federal court." *Id.* In essence, this mirrors the City's procedural maneuverings in this case.

The plaintiffs lost the state proceedings, but eventually prevailed in federal court on their constitutional claims. *Id.* at 911. They requested attorney's fees under § 1988 for the work done *in the state court on the state law issues.* The federal trial court awarded fees, including those incurred in connection with the non-constitutional state law issues. *Id.* at 912. In affirming, the Ninth Circuit stated:

> It is clear from the facts of this case that the state court action was initiated at the insistence of state appellants after the filing of the inmates complaint in the district court. . . . If we were to adopt state appellant's sophistic claim that 42 U.S.C. § 1988 is inapplicable because the proceedings in the state court were not brought to enforce rights guaranteed by section 1983, justice would truly be blinded from appreciation of reality. . . . The state issues were substantially the same as those raised in the federal claim. . . . *The inmates who were plaintiffs in the Oregon action were simply required to use a state forum to seek a possible state law basis for vindicating what were essentially the same rights that were the subject of the federal claim under section 1983.* . . . The Senate Report on section 1983 admonishes the courts to 'use the broadest and most effective remedies available to achieve the goals of our civil rights laws.'

Id. at 912-13 (emphasis added).

Furthermore, *Bartholomew* provides support for Hanna's argument that the comity of the justice system would be frustrated and judicial resources would be wasted if Hanna were forced to proceed in federal court on his federal constitutional claims—after he already won in state court—in

order to receive an award of attorney's fees under § 1988. In addressing the comity issue, the Ninth Circuit stated:

> If we were to hold that legal work done in a state court to vindicate rights recognized under section 1983 could not be compensated, serious strains between the state and federal court systems might develop....[t]his double standard of awarding attorneys' fees would encourage forum shopping and interfere with efficient allocation of issues and cases between the state and federal systems.

Id. at 913. Forum shopping is exactly what the City does.

The First Circuit employed the same comity rationale in *Exeter-West Greenwich Regl. Sch. Dist. v. Pontarelli*, 788 F.2d 47 (1st Cir. 1986). There, the First Circuit affirmed the award of attorney's fees for work done in Rhode Island state court on state law claims, after the federal district court *abstained* from deciding a certified state law issue. The district court found plaintiffs to be the prevailing party in the state court action and thus dismissed their § 1983 claim as moot. *Id.* at 49. Nonetheless, the district court, affirmed by the First Circuit, awarded § 1988 attorneys' fees to plaintiffs for their work in the state court on the state law question.

In its holding, the First Circuit cited *Bartholomew* and agreed that if fees are not allowed for work performed in state court proceedings when the district court abstains from a § 1983 claim, "serious strains between the state and federal court systems might develop." *Id.* at 51. The court's abstention is analogous to the Seventh Circuit refusing to hear zoning cases until the zoning grievance is litigated in state court first. Recognizing the need for comity and fairness in the judicial system, the *Exeter* court followed *Bartholomew*, and held that attorney's fees under § 1988 may be awarded for work done in state court proceedings—even when the § 1983 claim was not adjudicated and subsequently found to be moot in view of the state court decision.

Finally, *Americans United for Separation of Church & State v. School District*, 835 F.2d 627 (6th Cir. 1987), de-

serves further consideration. There, the plaintiffs filed their complaint in federal court, but only sought relief under the Federal Declaratory Judgment Act. *Id.* at 628. Having prevailed without asserting a § 1983 claim, plaintiffs sought attorney's fees under § 1988. The Sixth Circuit framed the issue as follows: "The question for decision is whether plaintiffs who prevail in an action against state authorities to vindicate rights secured by the Constitution must plead and rely specifically upon 42 U.S.C. § 1983 in order to be entitled to an award of attorney's fees under 42 U.S.C. § 1988." *Id.*

Exactly like the case at bar, the district court denied plaintiffs' fee petition, citing the "American Rule," under which prevailing litigants may not recover their fees under a "private attorney general" rationale in the absence of statutory authority. *Id.* at 629. The Sixth Circuit reversed, holding:

> The rule to be distilled from these decisions is that § 1988 is concerned with the substance of a prevailing party's action, rather that the form in which it is presented. The mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorney's fees if the pleading and evidence do present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy, and this claim is related to the plaintiff's ultimate success.

Id. at 631.

CONCLUSION

Vigorous enforcement of this Nation's civil rights laws, equity, and judicial comity require that the United States Supreme Court grant Hanna's Petition for Writ of Certiorari, and avail itself of the unique opportunity presented in this Petition to correct a manifest injustice in Illinois law. For these, and the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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June 28, 2005

APPENDICES

APPENDIX A

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

March 30, 2005

Ms. Jane Elinor Notz
Asst. Corporation Counsel
30 North LaSalle Street, Suite 800
Chicago, IL 60602

No. 98661 - *Albert C. Hanna, petitioner, v. The City of Chicago*, etc. respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 21, 2005.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FIRST DIVISION

[Filed March 7, 2005]

No. 1-01-3093
98 CH 01217

ALBERT C. HANNA
Plaintiff/Appellee/Cross-Appellant,

v.

THE CITY OF CHICAGO, a Municipal Corporation,
Defendant/Appellant/Cross-Appellee.

Appeal from the Circuit Court of Cook County

MODIFIED ORDER UPON DENIAL OF
PETITION FOR REHEARING

BEFORE Honorable Sidney A. Jones, III, Sophia H. Hall, *Judges Presiding*

Plaintiff Albert C. Hanna brought this action against defendant City of Chicago alleging an ordinance adopted by the City Council on October 28, 1997, which down zoned a 9-block area within the Lincoln Park neighborhood from R5 General Residence District to R4 General Residence District, was facially unconstitutional. The action culminated in a bench trial before Judge Sidney A. Jones, III, and Hanna, the long-term owner and resident of a single-family home affected by the rezoning, prevailed. His subsequent petition for approximately $1 million in attorney fees and $160,000 in

costs based upon the federal Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988(b) (1998)), was denied by Judge Sophia H. Hall, however, because Hanna had not prevailed on a federal claim. Both parties appeal. The City contends the ordinance would have withstood scrutiny if the circuit court had applied the proper test, the rational basis for constitutionality, rather than the more rigorous substantial relationship test, and that the court failed to hold Hanna to his burden of proof and failed to render sufficient factual findings to support judgment in his favor. The Park West Community Association, which recommended the rezoning legislation to the alderman who sponsored it before the City Council, and the South East Lake View Neighbors, as *amicus curiae*, have filed a brief in support of the City's position. Hanna contends he was erroneously denied attorney fees because a state court plaintiff who proves deprivation of his state constitutional rights is similarly situated to a federal plaintiff who prevails in a § 1983 federal civil rights action (42 U.S.C. § 1983 (1988)), and, therefore, public policy warrants awarding fees to the state court litigant. Hanna also contends it was an abuse of discretion to deny costs under 735 ILCS 5/5-118 (West 1998), because the trial showed the ordinance was adopted to benefit the Park West Community Association and one member in particular rather than the general public.

We begin with a summary of material facts disclosed by the record. The 9-block area subject to the ordinance is known as Deming environs. The area is bounded by the south side of Deming Place on the north, the north side of Fullerton Parkway on the south, the alley west of Clark on the east, and the west side of Orchard Street on the west, and it is entirely within the 43rd aldermanic ward. Since 1965, Hanna and his wife, Christine, have owned and lived in a Romanesque three-story single-family home built in the 1890's, located at the northern edge of Deming environs at 541 West Deming Place. When the Hannas bought the property in 1965 for $28,000, the area was zoned R6. It was down zoned

to R5 in 1986. The down zoning at issue, to R4 in 1987, reduced both the size of the building as well as the number of dwelling units permitted on any given lot. Although Hanna maintains he does not intend to redevelop his property, under R5, he could have erected a 9-unit, 6.5 story building, with a height ranging between 72 and 84', but reclassification to R4 limited him to a 6-unit, 4-story structure, about 50' high. The City Council has since limited any new construction in R5 and R4 districts to 45' and 38' respectively, but this more recent legislation was not at issue in Hanna's action.

The R4 down zoning at issue was proposed at a public hearing of the City Council Committee on Zoning on February 20, 1997. An assistant of 43rd ward alderman Charles R. Bernardini made the proposal on the alderman's behalf, and asked the zoning committee to "support th[e] change in order to preserve the character of th[e] neighborhood." The committee then heard testimony, beginning with parties who supported rezoning. A representative of real estate developer Frank Bailey and Stonegate Development Corporation offered support if it would not affect a pending R5 building permit. As a resident of Deming Place for more than 30 years, Andrew Reiffel, indicated support because of "the trends," which would be explained to the committee, and Nancy Reiffel concurred. Judith Kahn Marohn, the planning chair for the Park West Community Association, testified rezoning would allow development while "guarding against excessive density," which was "a real concern," because the average lot in the area was more than twice the size of a normal city lot, and " it can go without saying what *** potential problems [this] creates." Further, the "adjustment to R4 would appropriately reflect and validate current density scale and character of the neighborhood." She introduced another Park West resident, Steven Roman, who was an architect and urban planner. Roman indicated that most buildings were 70-to-100 years old and had "architectural significance." "Typical of that is along [W]est Fullerton Avenue, [which] is

designated a historical district." He said the Park West planning committee saw "a need for a thoughtful analysis of this proposed zoning change," and told him to "'do the homework,'" so Roman examined "each and every" one of the 1,772 parcels in the 27-acre area to determine its existing density. According to his research, "It turns out to be perfect R4. The overall existing floor area ratio is 1.196. R4 is 1.2. It's an ideal fit." Further, 70% of the parcels were R2, R3, or R4 density, and the other 30% were R5 and R6 density, so the area "passes the critical test for new zoning; that is, substantial conformity." In addition, "Fine tuning the zoning ordinance *** removes the heavy pressure from condo developers to demolish distinctive buildings and underdeveloped large buildings." He concluded, "We can recall a trend of development that occurred in the 1970s when four plus ones nearly wiped out the neighborhood assets. Let's avoid another trend in development [and] provide a high measure of protection for the special neighborhood." Andrew Brainerd, a resident of 612 West Deming Place, indicated a majority of area residents favored rezoning, that there was a "very serious density problem," and that it was difficult to find street parking, even at mid morning or early evening. Ted Novak, a resident of 618 West Deming Place, said he "strongly support[ed]" the initiative, and the zoning committee chair, Alderman William J. P. Banks, remarked, "Thank you, counselor. It's an outstanding endorsement considering all the work you do in zoning." Two individuals testified in opposition. Hanna, who said he was the president of a bank with $1.3 billion in assets, objected because down zoning would reduce available housing, population, and tax revenues on sales and real estate; discourage new construction; increase rent prices; diminish the labor pool, decrease property values; and render approximately 50% of the buildings non-conforming to the ordinance. He asked for a delay so that the City's zoning administrator could study the effects of down zoning. He also distributed written material to the zoning committee.

The last person who wanted to speak was a lawyer representing the owners of 543-49 West Arlington Place, who indicated agreement with Hanna. The committee subsequently voted, unanimously, to recommend that the City Council approve the proposed amendment, and the Council followed the committee's recommendation.

Hanna first filed suit in the circuit court of Cook County, seeking declaratory, injunctive, and other relief with regard to the two zoning amendments adopted after he acquired the property on West Deming. The City filed a notice of removal to federal court[1] because 9 of Hanna's 11 counts involved federal questions. The City's notice of removal indicated that four of Hanna counts alleged deprivation of property without due process of law in violation of the federal constitution and 42 U.S.C. § 1983,[2] three of Hanna's counts alleged a taking in violation of the federal constitution and 42 U.S.C. § 1983, one of Hanna's counts alleged a violation of the right to equal protection of the law under the federal constitution and 42 U.S.C. § 1983, and one of Hanna's counts alleged an invasion of property rights in violation of the federal constitution. The

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[1] Section 1441, which governs removal of actions, provides in relevant part: "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought." 28 U.S.C. §§ 1441 (b) (1998). Section 1446 sets out the procedures for obtaining removal. 28 U.S.C. § 1446(a) (1998).

[2] "§ 1983. Civil action for deprivation of rights. Every person who, under color of any *** ordinance ***, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ***. 42 U.S.C. § 1983 (1998).

action was removed. The City then filed a motion to dismiss the action, but Hanna moved for leave to file an amended compliant and to remand the matter back to state court, and a federal judge granted Hanna's motion and dismissed the City's motion as moot. The first amended complaint Hanna filed in the circuit court was limited to six state claims, but most were subsequently dismissed on the City's motion.

Hanna's second amended complaint consisted of three counts. As indicated earlier, Judge Jones presided over this portion of the proceedings. Judge Jones dismissed count I, which was based on inverse condemnation, for failure to state a claim, and presided over a trial as to counts II and III in November and December 2000 which included testimony from a dozen witnesses and over 200 exhibits. In count II, Hanna alleged the R4 ordinance violated his right of substantive due process under the Illinois constitution (Illinois Const. 1970, Art I, § 2) because it "is wholly arbitrary, capricious and unreasonable, and has no substantial relationship to public health, safety or welfare ***." In count II, Hanna alleged the ordinance violated his right under the Illinois constitution to equal protection of the law (Illinois Const. 1970, Art I § 2) "by treating his land differently than other similarly situated land ***." On all counts, Hanna sought preliminary and permanent injunctive relief of enforcement of the ordinance, costs, and fees. Judge Jones entered judgment for the City on the equal protection count, but ruled in Hanna's favor on the substantive due process count and enjoined the City from enforcing the ordinance. The following is a summary of the trial proceedings.

George V. Kisiel, a certified planner and licensed architect with Okrent Associates, testified as an expert in planning and architecture. In his opinion, the rezoning to R4 was inappropriate due to the percentage of properties rendered nonconforming to two requirements of the Chicago zoning ordinance (the floor-area ratio and minimum lot area per dwelling

unit requirements); and because the change did not preserve architectural character, further historic preservation, or alleviate a parking problem.

He personally considered 15% non-conformity acceptable, because the zoning ordinance allowed certain variances, usually around 10%, and he "figure[d] another 5 percent on top of that should provide an adequate margin." The zoning ordinance's floor-area ratio requirement (FAR), is the ratio between the square footage of livable space in a structure and the area of the building site. He calculated that 12% of the structures were nonconforming with respect to R5's FAR, and that 41% were nonconforming under R4. The zoning ordinance's minimum lot area per dwelling unit requirement is an expression of the allowable density, or number of units on a lot. In 1997, R5 required 400 minimum square feet of lot for every unit constructed and R4 required 900 minimum square feet (although the current R4 minimum lot area requirement is 1,000). Kisiel's calculations showed 11% nonconformance with R5's minimum lot area, and that this increased to 20% under R4.

Further, in Kisiel's opinion, down zoning did not preserve architectural character, because the area had a "mixed character" with "no consistent overriding character." He considred the factors of architectural character to be (1) elevation, (2) proportion, (3) setback from the street and other structures, (4) age, (5) floor height, (6) façade material, (7) the level of detail and craftsmanship, and (8) style. He indicated that no one factor predominated in the Deming area, because there was a range in building type and size, including single-family homes, 2- and 3-flats, and larger structures; a range in lot sizes between 1,600 and 17,500 square feet; and setbacks that were consistent in some areas but varied in others.

Additionally, the R4 down zoning did not limit street congestion by providing off-street parking, and was counterproductive because many existing structures were built before

there was a off-street parking requirement, and if they were replaced they would provide additional parking. Under both R5 and R4, the minimum and maximum off-street parking space requirements were 1 and 1.5 spaces for every dwelling unit constructed. His research showed 931 dwelling units and a deficit of 622 off-street parking spaces. He calculated that if every possible structure was demolished and replaced by an R5 structure (excluding the structures that were already protected by historic or landmark designation or that exceeded R5 zoning), 89 properties would be reconstructed and there would be 1,507 dwelling units in the area. If each new unit included 1 parking space per unit, there would still be deficit of 402 off-street spaces, but if each new unit included 1.5 spaces per unit, there would be a surplus of 78 off-street spaces. Under R4, however, complete redevelopment of the area would involve 53 properties, and there would still be a deficit of 621 spaces if 1 space per unit was constructed and a deficit of 493 spaces if 1.5 spaces per unit were constructed. Given Kisiel's assumptions, there was no opportunity to eliminate the off-street parking deficit under R4. However, Kisiel's scenario of rebuilding every potential lot with R5 maximum structures and parking spaces was "probably not" likely, and "[p]robably not [even possible], at least not without combining parcels."

On cross-examination, Kisiel acknowledged that he never studied land use in the surrounding area and had no opinion of the development trend. Also, the character of the Stonegate building, the only new construction in the area in the last 20 years, was not consistent with the character of nearby homes, because the lot was wider and the structure was 6-stories tall as opposed to 2- or 3-stories. His demolition scenario included structures listed as potential landmarks. In addition, he agreed, based on his experience with developers, that there would not be sufficient economic return for developers to build 3-flat buildings with 1.5 parking spaces per unit because some of the parking would have to be under-

or above-ground. Further, no publication supported his view that an acceptable non-conformance threshold could be established by adding 5% to the approximate 10% variance allowed by the Chicago zoning ordinance.

Judith Kahn Marohn testified that she had previously resided in Deming environs for 25 years, at 2465 North Geneva Terrace. She had been very active in the Park West Community Association since at least 1986, serving two terms as board president, and chairing the planning committee between 1990 and 1998. The association represented residents and businesses located between Diversey and Fullerton, and Halsted and Lakeview. She had no work experience or formal education in zoning or planning, and was not a traffic engineer. The planning committee consisted of 5-to-10 people. They all owned property within Park West, and none were African-American or Hispanic. She did not know whose idea it was to down zone, but the committee unanimously supported it, and no one in the association opposed it. She supported rezoning to R4 in part because R4 allowed for larger structures and more units per lot. Down zoning would prevent increased density and intensity of use. The committee was concerned about congestion in Park West and change in the character and size of the buildings, particularly that the area would be "canyonized" by uncharacteristically tall buildings. A "minor" or "very minor concern" was traffic and parking. The committee thought R5 was no longer suitable because the development climate in the Lincoln Park area had changed. Residents were not notified that the committee intended to discuss the issue on any particular date, but knowledgeable people were invited to the meeting in April 1996, including Ted Novak, a zoning attorney; Jay Case, a Park West member who had some experience in development; and Stephen Roman. She might have written about down zoning in the association's monthly newsletter, and when the issue was under consideration, the committee sent two informative letters to property owners.

A "Dear Neighbor" letter dated February 4, 1997, on Park West letterhead, signed by Marohn, indicated the down zoning request was pending in the City Council and that the City's zoning committee would send a letter about its hearing date. Her letter also indicated the association supported down zoning in order to "preserve the unique residential character, property values and quality of life of our neighborhood." Her letter invited recipients to phone for more information, with questions or comments, and to speak with a planning committee member.

The record also reflects that Marohn corresponded with Alderman Bernardini on Park West letterhead and had numerous conversations with the alderman and his staff between October 1996 and February 1997 regarding the rezoning. One letter reflects that the Park West board adopted a resolution on December 2, 1996, urging the alderman to "immediately" move the ordinance through the City Council because it would "establish a continuous Residential-4 Zone east of Clark Street, and *** preserve the small-scale, low-rise character and quality of life in our neighborhood." A letter dated February 6, 1997, provided the alderman with a copy of the association's February 4, 1997, "Dear Neighbor" letter.

Additionally, Marohn's memo dated February 7, 1997, provided the Park West board with a copy of the City's official notice regarding the proposed down zoning and a copy of the related "Dear Neighbor" letter. Marohn also wrote, "I'm curious to see how many calls we get and, especially, the responses. It'll give us an idea as to how large a support group we need to marshal[] for the hearing."

In a letter to the chair of the City Council's zoning committee, dated February 20, 1997, on Park West letterhead, Marohn sought support for the proposed rezoning:

> "We view this refinement of the Zoning Code as essential to permitting new development of various types, while guarding against excessive density."
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> "The latter is a very real concern, as we have learned from Stephen Roman, an architect and expert in the field of zoning studies and urban planning: the average lot in this [section] is more than twice the size of a normal City lot. More importantly, the adjustment to R-4 will appropriately reflect and validate the *current* density, scale, and character of the area."

A letter to the alderman, dated September 26, 1997, indicated the rezoning proposal had been approved by the zoning committee and that building permits had been issued to develop the Stonegate building, so the alderman should proceed with obtaining the full Council's approval.

During her testimony before Judge Jones, Marohn said the planning committee relied on observations, not studies, regarding its concerns for the area.

The City also questioned Marohn as part of its case in chief, establishing the following. Marohn was familiar with Deming environs in part because on several occasions she left fliers in every doorway in Park West. She observed that many lots were big and held 3-flates with big side yards. There were considerable front yards, "a spaciousness about the neighborhood," and back yards which contributed to a feeling of "a lot of open space." The buildings had a scale, proportion, and texture which was not seen in many of Chicago's newer residences, and they were in balance and complimented each other. Almost all the structures were built before World War I, and many were constructed in the 1880's and 1890's. The average height was low, and with the excep-

tion of the four-plus-ones and some tall apartment buildings, the maximum height was 3-stories. Marohn had also been on the Lincoln Park Conservation Association board; part of a Children's Memorial Hospital's committee which worked on planned development for the hospital's campus; a committee concerning the master plan for Lincoln Park itself, that is, the green park, not the neighborhood known by the same name; and a committee which worked with the Chicago Transit Authority on its plans to sell the former site of a bus barn. There were 400-to-500 households in the Park West group, and it had been formed around 1955. She was familiar with the zoning ordinance because of her committee work. She used "congestion" in reference to the crowding of buildings, and to indicate that open space would be filled in with solid buildings. As the planning chair, Marohn had testified before about a half dozen Chicago agencies, and had generally testified in favor of proposed development. The committee had been concerned that houses would be replaced with massive buildings or "warrens" of townhomes. The neighborhood received two notices, one in October 1996 and the other in February 1997, about the potential rezoning.

Marohn also testified about redevelopment in the area, indicating that it occurred in the Lincoln Park neighborhood, and then in Park West on Orchard. Specifically, about two blocks north of Deming environs, a 1 or 1-1/2 story wood cottage in the 2600 block of Orchard was replaced by a 55' 3-unit condo building. The buildings going up were very tall in comparison to surrounding homes. There had been other tear-downs since 1990. A cottage with a side yard had been replaced by 6 condos. Another tall building had gone up on the east side of Orchard, closer down to Drummond, and another on the west side of Orchard, in the low 2600's. In addition to Stonegate, there had been some redevelopment in the 700 block of Shubert, and in the 2700 block of Pine Grove. The Pine Grove construction involved 6 condos which replaced a cottage or farm house, with a side yard,

which had probably been the oldest building in the Park West. All of the new construction was red brick and limestone, flat in character, around 55" high. On the south side of Wrightwood, in the low 600's, three condos had gone up, and across the street there were 24 new units. These buildings replaced a Buddhist temple and its parking lot. In general, all the new construction was denser, bigger, and inconsistent with the character of existing buildings. It would be "terrible" if there was a proliferation of Stonegate-like buildings, because that structure was wider, deeper, and filled more of its lot than other neighborhood buildings. The planning committee supported down zoning from R5 to R4 because the committee thought the neighborhood would lose a lot of open space, flow, and rhythm from the front, back, and side yards, and existing buildings' scale, proportions, and elements.

Former 43rd ward alderman Charles R. Bernardini testified that he sponsored the rezoning in City Council. He had resided in the ward since 1976, at 2233 North Halsted. He was also a former member of the Cook County Board, and had an undergraduate degree in communications and an L.L.M. (advanced law degree) in state and governmental law. He gained some experience with zoning matters while on the Cook County Board between 1986 and 1991, and gained more experience with zoning and land use issues while alderman between December 1993 and April 1999. He recalled a lot of rezoning meetings, in and outside his office, that there had been "a lot of different people around," and that Marohn and Park West board president David Stroud were the "focus." Some factors brought to his attention were congestion, meaning the crowding of automobiles and people and a lack of open space, air and light; and maintaining the character of the neighborhood. He had introduced other down zoning measures, and was aware of other down zoning in the Near North, Lincoln Park, and Lakeview, which were aimed at congestion and maintaining the character of those neighborhoods. There was no formal study as to whether those rezonings accom-

plished their goals, but usually someone from the City planning department would observe and give feedback, and the alderman was "always [] getting feedback [from the planning department] as to what was going on in the rest of the city." At the time, traffic and congestion were getting worse. The only specific study he reviewed was Roman's, although he did "not really" rely on the report and "relied more" on recommendations of the neighborhood association and individuals, that is, his reading of how his constituents felt about down zoning. The zoning committee and the full City Council, not the Park West group, would consider the impact of the down zoning on the city as a whole. "[P]art of the hope" was to limit the dwelling units and ultimately the cars. Although no specific traffic or parking study was undertaken for the rezoning, traffic studies were frequently conducted due to major development proposals by Children's Hospital and DePaul University, which were within 1/2 mile of the rezoned area, and the alderman implemented "a lot" of permit parking, which was always preceded by City Parking studies. Hanna spoke at ward meetings and zoning hearings in opposition to down zoning, and he had a position paper on the subject. Hanna argued that down zoning was detrimental to minorities and the City's tax base. Bernardini had lived in the 43rd ward for 20 years, listened to dozens of people daily, participated in zoning committee meetings for every ward in the city, and was aware of the experiences of other alderman. He used his years of personal and professional experience, not a scientific study, to make a judgment about Hanna's arguments, and concluded the ideas were "really off the wall" and "contrary to common sense." The City's departments of planning and zoning requested that rezoning be deferred for further study, but no one from either department came to talk informally with the alderman, which occurred when they "ha[d] a serious problem with any kind of aldermanic action."

On cross-examination, Bernardini indicated that as an alderman, he had received regular reports on building per-

mits, saw the construction, saw attempts at zoning changes and variances, received related complaints, and become very familiar with every address in the ward. He was familiar with the pace and scale of new construction in the mid-1990s, and "Generally, every developer around was trying to maximize every inch in the ward and build to the maximum in a flurry of investment that was incredible." In the mid-1990's, a lot of older but functional buildings in the ward were torn down and replaced with "as much as possible on the lot." The new buildings "were bulkier, more dense, bigger," and "would occupy more square footage on the lot," resulting in less green or open space. As an example, the teardowns on Wrightwood between Clark and Sheffield brought a wave of complaints and were often cited as what people "wanted to avoid." Deming environs included a lot of buildings that were "older," "architecturally-attractive," and listed as historically significant. Bernardini believed there was general neighborhood support for rezoning. Only Hanna opposed it.

Paul Woznicki testified that he had been Chicago's zoning administrator since 1994, and had previously served as the assistant zoning administrator for 3 years and spent 15 years in the planning department. Chicago's zoning ordinance was adopted in 1957. The City had not studied, whether residential down zoning was "a good or bad idea or how it should be accomplished if at all," but would conduct this type of study soon, due to the high number of rezonings. About 600 zoning changes had been made in each of the last three years. It was more difficult to administer the zoning ordinance when properties within a district were non-conforming. The zoning and planning departments were required to recommend that the City Council's zoning committee vote for, against, or to continue an application. Woznicki recommended deferral "for further study so we knew the facts" about Deming environs, because he got nervous going to the zoning committee, and he "wasn't going to go over there and not have the answers to the questions." He needed to know the number of

non-conforming structures under the existing and proposed zonings. On direct examination, Woznicki said he never formed an opinion as to whether R4 was appropriate for the Deming area, and that requesting deferral was a way of saying that he did not really know what zoning classification was appropriate.

Edwin S. Mills testified that he was living in Evanston, Illinois but had lived a couple of blocks from the Deming area between 1987 and 1999, within Park West at 42 Roslyn Place. He was recently retired from Northwestern University's Kellogg School of Management but was still writing about urban development and real estate issues. He had a Ph.D. in economics and considered himself an urban economist concentrating on real estate development and problems in urban areas. Urban economics concerns how an area grows and is organized, where activities and housing are located, and how government policies affect them. Mills had been a litigation expert in a New Jersey case involving a very high income community which "zoned out" low and moderate income people and the case resulted in the construction of less expensive housing. He never studied Deming environs specifically. In his opinion, down zoning Chicago's lake front after 1970 prevented high density development which "ought to be justified in some of these very advantageous areas." Down zoning in any desirable area helped reduce the urban population as a whole because it drove up housing prices. Housing prices had risen more rapidly in Lincoln Park than almost any where else in the City, and a lot of people, including middle income people, could not afford to buy there. The price increase would have been smaller without down zoning. Lincoln Park is considered a high income community area with a median income per family of $75,000 per year, which is higher than both the national and City figures. Mills initially stated that population had remained about constant in Lincoln Park but the minority population (people who self-identified as non-White) dropped from 28%

to 25% between 1980 and 1990, which Mills attributed to down zoning. When shown an exhibit, however, Mills indicated that between 1980 and 1990, Lincoln Park's total population had actually increased by 7% while the minority population had decreased by 39%. He indicated that if people could not find affordable housing in Lincoln Park, they mostly went to the suburbs. It used to be that most people lived in the City, but now 1/3 live in the City and 2/3 live in the suburbs. In Mills' opinion, the down zoning was not passed in the interest of the City as a whole, but in the interest of the people in Park West, and he based this conclusion on his experience as an urban economist, living in Lincoln Park for over a decade, reading the Chicago Tribune and Crain's Chicago Business, listening to the news, and belonging to various real estate groups.

On cross-examination, Mills said had no doubt the R4 down zoning increased the value of Hanna's home. He was concerned that population in lakefront communities declined between 1950 and 1990 and that moderate income people "suffer" when government "interferes with housing supply." Suburbanization occurs for a lot of reasons, and has occurred worldwide during the last 20, 30 or 40 years. Suburbanization was not unique to Lincoln Park or the lakefront communities, and had caused pervasive population loss in central U.S. cities in the last 30 or 40 years. The term "population loss" includes population decrease and failure to grow. Chicago's population declined after 1950, due to rising incomes, regional migration, relatively higher taxes, relatively higher crime rates, and to some extent poorer schools, and other, minor factors. It would be extremely difficult to quantify the impact of down zoning as opposed to any of the other factors causing population loss, and no reputable economist had quantified the impact. Down zoning could exacerbate population loss caused by the other factors. Between 1970 and 1990, the down zoned Lincoln Park area declined in population by about 10%, while the City's population de-

clined about 17%. Mills was familiar with arguments in favor of down zoning, including (1) that bigger, dense buildings block sunlight and circulation, which is true, although Chicago has "good air circulation," and (2) that it maintains traditional neighborhood character, which is valid from "the eye of the local residents."

On redirect, Mills said the argument that highly dense buildings block sunlight and air was flawed because every building does that—the second building blocks more that the first building, the third blocks more that the second, and so on. He saw no difference between the "third" and "fifth" buildings and did not think the "fifth" building was significant enough to justify opposition. One of the "greatest events" of his life was to watch residents in a 60-story building in the Streeterville neighborhood come downstairs to vote against a 30-story condo building proposed for the area.

Phillip J. Butler, testifying as an expert in real estate appraisal, said Hanna's land lost about $427,000 in value due to the down zoning. Butler valued the land only and did not consider the value of the residence. He based his calculations on average prices for vacant lots zoned R6, R5, or R4. On cross-examination, Butler said he had no opinion as to what Hanna's improved property was worth on the open market under either R5 or R4. The proper technique for valuing improved property such as Hanna's was to do a sales comparison, but Butler did not use that technique because he was only looking at the impact on the land. His vacant land formula would not accurately predict the sale price of an improved lot.

Albert C. Hanna testified that he had been working in the mortgage and financing field for about 40 years. He started his own mortgage bank, Mid North Financial Services, Inc., in 1982. He spent 85% of his time reviewing properties, developments, and trends in Chicago, the 6 "collar" counties, and Porter and Lake Counties in Indiana. He had opposed

down zoning the Near North neighborhood and imposing rent control in Chicago, but he was on the Landmarks Preservation Council, which promoted the preservation of older buildings, such as the Fisher Building and Tree Studios, and he did not consider himself "anti-preservationist." Housing was important to the labor pool and the tax base. It was an "enormous concern" to him that Census Bureau data suggested Chicago's population could double by 2100. Because of this change in population, the "City has got to study and analyze its responsibilities to the future housing needs of [its] citizens."

As a resident of Deming Place for 35 years, Hanna indicated Deming environs is "a residential area that has no prevailing architectural character." It includes "Victorians" built in the 1880s and 1890s, traditional Chicago courtyard buildings built between 1910 and 1929, scattered four plus ones, churches, and two commercial stores. There are 2-, 3-, 4-, 7-, 8- and 10-story buildings in the area, and adjacent high rises of 10 or more stories. Between 1960 and 1980, the Deming area had a "cosmopolitan mix" of income and race, and more than 20 children on the street who played with Hanna's three children. Since then, the lower income group had "all but disappeared and been replaced by the suite-and-tie crowd." He rarely saw African-American, "Oriental," or Latino people in the area. The workers, lower-income, and minorities used to reside in the four plus ones, converted single-room concrete hotels from the 1920s, the "601 building," and others, but rents had risen. The lack of diversity accelerated after 1980. There was now a concentration of higher income people, making at least $40,000 or $50,000 in the Loop. Housing prices gradually increased and then accelerated "in 1990, 1999." The Deming rezoning was prompted by a proposal to replace two single-family dwellings at 615-619 West Deming with the Stonegate building. He "absolutely" supported Stonegate's development and offered the only opposition to down zoning. The north side of Deming

Place (outside the boundaries of Deming environs) had been predominantly down zoned to R2, and within a year, the down zoning at issue occurred. The reduction in potential units on Hanna's land from 9 units under R5 to 6 units under R4 was important to him since he and his wife were in their 70's and might have to sell their home because of maintenance costs and taxes, or because they might have to sell the land if a fire destroyed so much of the home that it was not economically feasible to rebuild. These two considerations also entered into Hanna's estate planning because his wife would inherit upon his death and would sell the property. In Hanna's opinion, a property owner should be able to decide whether an older home is retained or replaced with a larger building. If Hanna's land were redeveloped to R5 maximum as sketched by his architect (Todd Main), with a building 84' tall with a setback on the top floor, it would not affect the character of the neighborhood because there were tall buildings within Deming environs and concrete buildings on Arlington. Further, the view from the 2-story townhouse immediately next door to Hanna would not be affected by Hanna's contemplated redevelopment, because the neighbors were already looking at Hanna's existing brick wall.

On cross-examination, Hanna acknowledged the market value of the property was not decreased by the R4 down zoning, and that he did not adjust his April 1998 estate plan in response to the change. He stated that a resident's use and enjoyment of his property is not adversely affected by a new building which interferes with his view, reduces the light received, or takes up what had previously been open space; and it was not reasonable for area residents to take steps to stop new buildings from interfering with their view, access to light, or the openness of the neighborhood. He admitted, however, to filing suit in 1987 to enjoin construction at the corner of Clark and Deming, and testifying that the proposed construction would "destroy the street," since it "creates a blockage of vision from Clark Street looking west, and it

blocks my vision from my house and other neighbors' houses looking east towards Clark Street. Also[,] it create[s] a massive building that protrudes into an area that has always been open and light and airy, and it would further create a problem with uniformity." He also acknowledged there was a pattern in Lincoln Park in the early-to mid-1990's in which buildings were replaced with taller structures. Although Stonegate had a bigger footprint than the two homes it replaced, Hanna "absolutely" would like to see more properties of that size and scale built throughout Deming environs.

Matthew Blaisse Filippini, an architect, testified as an expert witness on building construction and city infrastructure. In his opinion, the City's water supply, sewage system, public transportation, fire and emergency medical services, and electric and natural gas providers could accommodate a projected growth in population of 4-to-6% between 1999 and 2020. There would be a corresponding increase of 52,000-to-70,000 rental households. The existing rental market was "tight" and there was a need for rental housing. The number of rental units decreased by 61,000 units between 1990 and 2000 through demolition and condo conversion, and the population has increased over the last few years. After walking through Deming environs, he concluded there was a potential for a couple hundred more units.

On cross-examination, Filippini acknowledged that he had no experience in housing policy, and that he had walked through Deming environs only once.

Todd Main testified as an expert in architecture and building design. His work showed that it was practical to build 9 2-bedroom units on Hanna's property under R5 zoning, but this did not take into account the City's newly enacted height restrictions. He included the minimum parking spaces per dwelling unit. Six units could be built under R4.

Neil Kenig testified as an expert in traffic and parking. His experience in traffic and parking dated to 1957, and included performing about a hundred Chicago traffic studies and 30 or 40 parking or parking-related studies. He performed a traffic study in the Deming area in February 2000. In his opinion, the traffic level was not "unacceptable" and the area could accommodate 600 more residential units, although he did not typically calculate the number of units that an area could accommodate. Using his own observation, census figures for car ownership, and George Kisiel's report, Kenig concluded that down zoning from R5 to R4 would not improve parking in the area. Under R5 there had been an opportunity to increase parking in the area.

On cross-examination, Kenig acknowledged his opinion relied to a fair extent on Kisiel's report, and that the type of redevelopment Kisiel assumed (demolition and redevelopment of every potential building to R5 with 1.5 parking spaces) would take 10 or 15 years, or even longer. Also, less that 5% of all multi-family residential development provided 1.5 parking spaces per unit, and he was not aware of any properties in or even around the area that had that many parking spaces. The Deming lots would not accommodate 1.5 surface parking spaces, unless they were developed with single-family homes, so it would be necessary to provide enclosed parking if the lots were developed to maximum dwelling and parking capacities. The average cost per parking space for surface, raised, and underground parking lots was $2,000, $10,000 and $20,000, respectively. Parking garages were being built on Clark Street just across the street from Deming environs, there were new ones just north of Diversey, and there was one proposed for the south side of Diversey just west of Clark.

Thomas P. Smith testified for the City as an expert in urban planning. His previous experience included about a year as the assistant commissioner of zoning for the City's depart-

ment of planning, 9 years as the department's director of development, and 10 years preparing "best practice" reports and manuals for the American Planning Association, which is a city planners' trade association. He held masters' degrees in urban planning and business. He frequently testified about rezoning, sometimes opposing it, and he had refused to testify for the City on at least two occasions. In his opinion, R4 was a good fit for Deming environs, considering the surrounding zoning, the density and type of buildings, and the size, height and general scale of the buildings. Most of the surrounding area was zoned residential. To the immediate west and further west was R4, to the immediate north and further north was R2 and R4, and to the south was the Mid North Historic District, a City landmark district, which was R5. Planned and city-approved residential developments were substantially R4, including 15 single-family homes and 15 two-flats and 3-flatss, with a floor-area ratio of 1.2, although slightly higher density would occur on the Clark Street frontage, including planned senior housing. The surrounding buildings were R4. Deming's density was predominantly R4, specifically 80% of the buildings. Smith's conclusions were based on maps and visits to the area to count doorbells, meters, and mailboxes to determine the number of units. He went back 7 or 8 times to double check his numbers. Under R5, 91% of the buildings were conforming. The rezoning rendered 11% of the buildings non-conforming, which reinforced Smith's conclusion that Deming environs was predominantly R4 in terms of density.

Smith disagreed with prior testimony indicating that if non-conforming structures exceeded 15%, then the classification was inappropriate. This number was arbitrary and it was not "in any of our professional journals" or used by any reliable authority in the field of urban planning. Further, "what you really want people to do is exercise some judgment about all the factors that go into determining what the appropriate classification is." George Kisiel's testimony was based on

one or two figures, but appropriate zoning is based on a combination of factors, including neighborhood density, the types of buildings in the neighborhood, the floor-area ratios, and the characteristics of the buildings. "[Y]ou don't just plug in numbers and come out with a conclusion[,] *** it's more complex than that."

More than half the area's residential structures were single-family homes, which was "significant." In contrast, only 20% of the homes in the central Lakeview neighborhood were single-family, and Smith had testified in opposition to down zoning there. About 76% of Deming's buildings had 3 units or less. Since the neighborhood had "a lot of low density buildings" and "an unusual number of single-family homes," it was "important to be careful with the zoning" because "new construction might fit in or not fit in." Additional, 90% of the buildings were 3.5 stories or less, and 10% are four or more stories, so the "truly *** predominant character [was] the low-rise kind of buildings that you see commonly in an R4 district." Because of the predominant character, an R4 classification would assure that new construction "fits in."

In addition, downzoning to R4 furthered the City's interests of protecting the neighborhood's scale and historic resources. The homes reflected a certain period and history. Care and attention had been given to their construction and they were impeccably maintained and in excellent condition. The Planning Department's inventory of about 500,000 buildings in the City identified only 3.5% of Chicago buildings as historically or architecturally significant, but 75-to-80% of Deming environs buildings as architecturally or historically significant. This was a very important factor to Smith, because it showed this was an unusual neighborhood with some very important buildings. Further, architectural guide books promoted the area as architecturally significant, and the Commission on Chicago Landmarks had preliminar-

ily proposed to designate Deming environs as a landmark district, and produced a list which included 98% of the Deming properties. Further, the City often rezones in anticipation of landmarking, because rezoning is less complex administratively. Examples include Roslyn Place, which is north and east of Deming Environs; the Drake Hotel and the nearby condos; Astor Street in the Gold Coast; and the Norwood Park neighborhood on the far northwest side. Furthermore, the National Trust for Historic Preservation, Smith's profession (city planning), and the American Planning Association advocate down zoning as a historic preservation tool.

Another factor was that the number of tears downs occurring in Chicago since 1993 was unusual, and between 1993 and 1997, many frame buildings and buildings with slightly bigger yards or deep lots in or near Deming environs were torn down. The R5 zoning was "too generous" and "created an incentive" for people to tear down buildings "because the gap between what's out there now and what you could do under the R5 zoning is so significant." For example, the lot at 2403 North Orchard, where there was a single family home, could be redeveloped as 4 condos under R4, and 13 condos under the R5. The R4 zoning helped to prevent construction that was inconsistent with the character and scale of the existing buildings. Further, Deming environs is "a builtup neighborhood," with "a size and scale." New buildings to the R5 maximum would "adversely affect adjoining properties" and "result in buildings that don't fit in well with the rest of the neighborhood." Architect Main's sketch of a potential 9-unit R5 building on Hanna's lot could be described as "a sliver building" or "flats on steroids" because the height was "more than two and a half times" the width of the building, and it was "not proportional."

Smith also testified that Chicago, like most bigger, older, industrial cities, does not have a comprehensive plan to direct growth and development, because it is hard to do that type of

plan for a large city with diverse neighborhoods. However, the City does a considerable amount of strategic planning and addresses pressing issues. Mayor Washington's Task Force on Neighborhood Land Use reported problems with big buildings going into neighborhoods which had low rise and low scale, and a need to down zone to protect a "context" and "existing character." The Task Force recommended a grass roots approach and identified the Park West group as a very positive example.

Smith recommended that the downzoning be deferred for further study, and he could not recall why he did not do a further work up, but it was probably because downzoning that area was not controversial. He worked on about 750 rezoning applications in the year 2000, and focused on the "squeaky wheel." The case for rezoning Deming was "very compelling," and he would recommend it if he were doing a work up today. This concluded the trial.

In its appeal, the City contends Hanna failed to prove by clear and convincing evidence that the rezoning was invalid under the factors specified in *LaSalle National Bank*, 12 Ill, 2d 40, 145 N.E.2d 65 (1957) and *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

A zoning ordinance, as a legislative judgment, is presumed valid. *Northern Bank/Lake Forest, N.A. v. County of Lake*, 311 Ill. App. 3d 332, 336, 723 N.E.2d 1269, 1274 (2000). Where there is room for a legitimate difference of opinion concerning the reasonableness of an ordinance, courts will not interfere in the legislature's judgment. *Northern Trust Bank*, 311 Ill. App. 3d at 336, 723 N.E.2d at 1274. The plaintiff bears the burden of proving by clear and convincing evidence that the application of the ordinance to the property is unreasonable and arbitrary and bears no substantial relation to public health, safety, morals, or welfare. *Northern Trust*, 311 Ill. App. 3d at 336, 723 N.E.2d at 1274. Clear and con-

vincing evidence is "more than a preponderance while not approaching the degree of proof necessary to convict a person of a criminal offense." *Drogos v. Village of Bensenville*, 100 Ill. App. 3d 48, 54, 426 N.E.2d 1276, 1281 (1981). The manifest weight of the evidence is "that which is clearly evident, plain, and [the] indisputable weight of the evidence." *Drogos*, 100 Ill. App. 3d at 54, 426 N.E.2d at 1281. A finding is contrary to the manifest weight of the evidence when the opposite conclusion is clearly apparent. *Drogos*, 100 Ill. App. 3d at 54, 426 N.E.2d at 1281.

The validity of each zoning ordinance must be determined on its own facts and circumstances (*LaSalle*, 12 Ill. 2d at 46, 145 N.E.2d at 69), yet the following facts may be taken into consideration in determining the validity of an ordinance: (1) The existing uses and zoning of nearby property, (2) the extent to which property values are diminished by the particular zoning restrictions, (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public, (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner, (5) the suitability of the subject property for the zoned purposes, and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property. *LaSalle*, 12 Ill. 2d at 46-47, 145 N.E.2d 69. In *Sinclair*, 9 Ill. 2d at 378, 167 N.E.2d at 411, the supreme court added: (7) community need for the proposed use and (8) the care with which the community has undertaken to plan its land use development. No one factor is controlling (*LaSalle*, 12 Ill. 2d at 47, 145 N.E.2d at 65), although the first factor is considered of paramount importance. *State Bank of Countryside v. City of Chicago*, 287 Ill. App. 3d 904, 912, 679 N.E.2d 435, 441 (1997).

With regard to the first factor (existing uses and zoning of nearby property), the trial judge found the Deming area had

"no character," a "thorough mix" of R6, R5, and R4 buildings, and that nearly 50% of the buildings were rendered nonconforming.

The trial judge apparently placed little emphasis on the second factor (the extent to which property values are diminished), pointing out that it was usually not determinative because property is almost always worth more under the challenged reclassification. See *Northern Trust*, 311 Ill. App. 3d at 339, 723 N.E.2d at 1276.

The trial judge indicated the third and fourth factors were often considered together (the extent to which the destruction of the value of the plaintiff's property promotes the health, safety, morals, or general welfare of the public; and the relative gain to the public compared to the hardship upon the individual property owner), and held that the down zoning accomplished no discernable benefit to the public. More specifically, the trial judge rejected the City's argument that the ordinance was justified because rezoning preserved architecturally and historically significant structures. The judge found this was a recent contention that was "entirely pretextual," and he remarked that property owners, such as Hanna, are entitled to rely upon existing zoning. *Hanna v. City of Chicago*, 331 Ill. App. 3d 295, 305, 771 N.E.2d 13, 21-22 (2002) ("'one who buys land has a right to rely upon the classification which existed at the time the purchase was made, and upon the rule of law that the classification will not be changed unless the change is required for the public good.'"). The judge also rejected the City's argument that the ordinance was justified because rezoning curtailed a trend of tear downs, and indicated that the only evidence of teardowns within Deming environs itself was the Stonegate building at 615 West Deming. Finally, with respect to the third and fourth factors, the trial judge found that the neighborhood was "most fairly characterized as being of entirely mixed character."

The trial judge stated that the fifth factor (the suitability of the subject property for the zoned purposes), was of little importance and that the sixth factor (the length of time the property has been vacant) was not applicable.

However, the trial judge devoted considerable analysis to the seventh factor (the community need for the proposed use), and found there was no community need for R4 zoning. The judge found there was no community need to preserve character and scale at R4 because Kisiel's study indicated a high percentage of structures did not conform to R4. The trial judge also found there was no community need to protect against overbuilding and excessive density by down zoning to R4, because the Stonegate building was the only new construction in 20 years, and the total number of housing units in Deming environs had decreased between 1980 and 1990, and the overall population had actually decreased. The judge also expressed concern that by disproportionately increasing housing costs, down zoning in the lakefront communities adversely affected those of moderate means who lived or wanted to live in the area.

As to the eighth factor (the care with which the community has undertaken to plan its land use development), the trial judge stated, "The most lenient characterization to be applied in this case is that the City rushed into an enactment solely at the behest of an interested citizen [Judith Marohn] rather than engage in any reasonable planning considerations." The City's zoning and planning departments recommended deferral for study, yet no study was undertaken before the rezoning was passed. The alderman who introduced the ordinance in City Council did not undertake any studies and relied primarily on the urging and testimony of the neighborhood group to secure its passage. However, the neighborhood group relied on personal observation, not study, and did not review or analyze whether the number of housing units had changed; the source of traffic problems and the congestive effect of pass-through

traffic; the impact on property values, rent, and the potential to encourage conversion of rental units to condominiums; and the impact on the labor pool, middle-income families, and minorities.

The City takes issue with the trial judge's findings, but does not contend they lack the support of the record. As the court remarked in *LaSalle*, each side produced evidence to support its contentions, and a difference of opinion does not render a plaintiff's evidence unbelievable. Further, the trier of fact was in a better position to determine the credibility to be accorded to the witnesses and their opinions, and a reviewing court will not reverse a trial judge simply because it could reach a different conclusion based on conflicting evidence presented at trial. *Northern Trust Bank*, 311 Ill. App. 3d at 337, 723 N.E.2d. at 1274. Our careful review of the record and pertinent authority does not disclose that the indisputable weight of the evidence required the trial judge to reach opposite conclusions, or that the trial judge's findings as to the *LaSalle/Sinclair* factors were insufficient as a matter of law to support judgment for Hanna.

The City takes particular issue with the trial judge's analysis of the fifth and sixth *LaSalle* factors (the suitability of the subject property for the zoned purpose and the length of time the property has been vacant), and contends the trial judge failed to hold Hanna to burden of proving by clear and convincing evidence that the rezoning ordinance was invalid. More specifically, the City argues that the fifth and sixth factors should have been weighed in the City's favor because the trial judge found that Hanna's property was suitable for R6, R5, or R4 and because Hanna's property was not rendered vacant, unsaleable, or underdeveloped due to the R4 zoning. As indicated above, instead of weighing these particular factors in the City's favor, the trial judge found that the fifth factor was "of little importance" and the sixth factor was "not applicable." The City contends, therefore, that the

trial judge failed to show appropriate deference to City Council's judgment. However, *LaSalle* itself indicates that "the validity of each zoning ordinance must be determined on its own facts and circumstances, "*LaSalle*, 12 Ill. 2d at 46, 145 N.E.2d at 69, and the City cites only general authority and no authority indicating that the facts relevant to the fifth and sixth factors should have received greater emphasis in this particular case. Further, *LaSalle* prefaced its recitation of the factors by saying they were "among the facts which may be taken into consideration in determining validity of an ordinance" ((emphasis added) *LaSalle*, 12 Ill. 2d at 46, 145 N.E.2d at 69), and also remarked that "[n]o one factor is controlling." Accordingly, we reject the City's contention that the trial judge failed to give sufficient deference to legislative judgment in its analysis of pertinent facts and circumstances.

The City's third and final contention is that the trial judge erroneously held that a facial challenge to a land use regulation under the due process clause is subject not to the rational basis test, but to the more searching standard of the substantial relationship test for constitutionality. This court rejected the argument in an earlier case involving the same parties but a different piece of real estate and a different zoning ordinance amendment. We held that in a facial challenge to the constitutionality of a zoning ordinance, the applicable level of court scrutiny is whether the legislation bears a substantial relationship to the public health, safety, and welfare or whether it is arbitrary, irrational, and capricious. *Hanna*, 331 Ill. App. 3d at 306, 771 N.E.2d at 22. The City contends the decision was incorrect and should not be followed. The supreme court, however, rejected the City's petition for leave to appeal from that decision. *Hanna v. City of Chicago*, 201 Ill. 2d 566, 786 N.E.2d 183 (2002). Under the circumstances, we decline to revisit the City's argument.

We find none of the City's arguments to be persuasive and therefore affirm the orders entered against the City in its appeal.

We are similarly unpersuaded by Hanna's arguments that the City should have been required to pay his attorney fees and costs. The prevailing rule in the United States is that in the absence of statutory authority or a contractual agreement, a successful litigant may not recover attorney fees or litigation costs from his adversary. *Baksinski v. Northwestern University*, 231 Ill.App. 3d 7, 12, 595 N.E.2d 1106, 1109 (1992). Further, "Illinois has long adhered to this rule." *Baksinski*, 231 Ill. App. 3d at 12, 595 N.E.2d at 1109. Hanna cites no statute or contract entitling him to an award of attorney fees or costs. Therefore, we would reverse Judge Hall's denial of fees and costs only if Hanna demonstrated the ruling was a clear abuse of discretion. See *City of Chicago v. Korshak*, 276 Ill. App. 3d 597, 602, 658 N.E.2d 1165, 1169 (1995) (attorney fees); *Cowhey v. City of Chicago*, 259 Ill. App. 3d 244, 246, 631 N.E.2d 264, 265-66 (1994) (litigation costs).

The only statute Hanna identifies is the federal act, § 1998, indicating that the court has discretion to award a prevailing plaintiff attorney fees in an action brought under certain federal acts, including § 1983. 42 U.S.C. § 1988(b) (1998). In turn, § 1983 confers no substantive rights, but is an avenue of redress when a right secured by the federal constitution and federal law is violated by a person acting under color of law. 42 U.S.C. § 1983 (1998); *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2255 (1988); *Scheidler v. Cook County Officers Electoral Board*, 276 Ill. App. 3d 297, 304, 657, N.E.2d 1089, 1194-95 (1995); *Doe v. Calumet City*, 161 Ill. 2d 374, 397, 641 N.E.2d 498, 509 (1994). Therefore, this court has held that Illinois courts should award attorney fees under § 1988 only in only two types of cases: "(1) where federal statutory or constitutional law is the basis for a decision in

favor of the claimant, or (2) where federal law remains intimately involved in the case until a settlement or consent decree is entered into." *Caputo v. City of Chicago*, 113 Ill. App. 3d 45, 48, 446 N.E.2d 1240, 1242 (1983).

However, federal law was not a basis for the judgment entered in Hanna's favor, and although Hanna's initial complaint included federal claims, he abandoned them by amending his action in order to return to state court. The City removed Hanna's initial complaint to federal court, and then filed a motion to dismiss. Rather than testing the sufficiency of his claims in federal court by opposing the City's motion to dismiss on its merits, Hanna withdrew his federal claims and sought remand of his remaining state claims to state court.

Hanna cites a number of cases he contends support his claim for fees, however, almost all of the cases are federal decisions awarding attorney fees pursuant to the federal statute, rather than Illinois or any other state's award of fees pursuant to the federal statute. See *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982), *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985), *Exeter-West Greenwich Regional School District v. Pontarelli*, (788 F.2d 47 (1st Cir. 1986). The exception *is Rowan Companies, Inc. v. Louisiana State Tax Comm'n*, 623 So.2d 159 (La. 1993), *cert. denied*, 631 So. 2d 444 (La. 1994). In *Rowan*, the plaintiff pled violations of both the Louisiana and United States Constitutions (*Rowan*, 623 So.2d at 160), and although the resulting judgment was expressly based on the state constitution, the trial judge implicitly considered and found a violation of the federal constitution. *Rowan*, 623 So.2d at 162. More precisely, the trial judge applied the federal constitutional burden of proof and cited federal decisions regarding the federal standard at issue. *Rowan*, 623 So.2d at 162. *Rowan* is therefore consistent with *Caputo's* indication that a state court should award attorney fees under § 1988 only where federal law forms the basis of a decision or where federal law remains

intimately involved in the case through the point of a negotiated resolution. *Caputo*, 113 Ill. App. 3d at 48, 446 N.E.2d at 1242.

Under the circumstances, the denial of Hanna's request for attorney fees was not an abuse of discretion, and warrants our affirmance.

Moreover, the only statue Hanna cites in support of his argument for costs is one providing for a discretionary award of costs, 735 ILCS 5/5-118 (1998). It does not explicitly reference the imposition of costs against municipalities, and the City contends statutes should not be construed as imposing liabilities upon municipalities unless they expressly state they are applicable to municipalities. See e.g., *Kozak v. Retirement Board*, 128 Ill. App. 3d 678, 681, 470 N.E.2d 1293, 1295-96 (1984) (rejecting request for statutory interest); *Clayton v. Village of Oak Park*, 117 Ill. App. 3d 560, 565, 453 N.E.2d 937, 942 (1983) (rejecting argument that statute which did not overtly mention government activities was applicable to village, and stating that the rights of the sovereign are not impaired by general legislative enactment governing private rights unless the enactment expressly makes the sovereign accountable). Hanna concedes the City's cited authority is controlling, and has withdrawn his claim for costs. Accordingly, we affirm the denial of costs.

The orders entered by the trial court raised by the City's appeal and Hanna's cross-appeal are affirmed.

Affirmed.

McBRIDE, J., with GORDON and O'MALLEY, JJ., concurring.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

No. 98 CH 1217

ALBERT C. HANNA

Plaintiff,

v.

THE CITY OF CHICAGO, a municipal corporation,

Defendant.

MEMORANDUM OPINION

BEFORE Judge Sophia H. Hall

Plaintiff, Albert C. Hanna ("Hanna"), by his attorneys, Marshall, O'Toole, Gerstein, Murray & Borun and Much, Shelist, Freed, Denenberg, Ament & Rubenstein, seeks attorney's fees pursuant to Title 42, United States Code, Section 1988. The only issue before this Court is whether 42 U.S.C. § 1988 attorney's fees should be awarded where plaintiff has not alleged and prevailed on a violation of § 1983 or a provision of the federal constitution. Hanna argues that he is entitled to § 1988 attorney's fees even though he did not explicitly plead 42 U.S. C. § 1983 since the substantive due process right protected under the Illinois Constitution has been held to be the same right protected under the 14th Amendment for which § 1983 provides a remedy. The City argues that Hanna specifically did not plead any federal claims, nor did the state court find Hanna had proved any federal claim, that would entitle him to an award of § 1988 attorney's fee.

CASE HISTORY

On January 30, 1998, Hanna filed his initial complaint for declaratory, injunctive and other relief with the Circuit Court of Cook County, Illinois ("Circuit Court"). Count VII of Hanna's initial complaint explicitly alleged the City's violation of § 1983 and of the federal substantive due process clause under the 14th Amendment. On April 3, 1998, the Circuit Court granted the City's motion to remove the case to the United States District Court for the Northern District of Illinois ("District Court"). There, the City moved to dismiss the case, citing *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals.") District Court Judge Paul Plunkett did not decide the motion to dismiss, because on May 21, 1998, he granted Hanna's motion for leave to file his first amended complaint and to remand this case to the Circuit Court. The first amended complaint contained no reference to § 1983 or the federal constitution. The City then filed a motion in the Circuit Court to dismiss Hanna's Illinois substantive due process claim, Count IV of the first amended complaint. On October 21, 1998, Judge Thomas Hett denied that motion.

On November 24, 1998, Hanna filed his second amended complaint ("Complaint"). As in the first amended complaint, Hanna did not plead a violation of § 1983 or the federal constitution. On December 6, 1999, Circuit Court Judge Sidney Jones denied the City's motion to dismiss Hanna's Illinois substantive due process claim, Count II of that Complaint. After a trial, on April 4, 2001, Judge Jones entered judgment for Hanna on Court II of that Complaint, finding that the City violated Hanna's substantive due process rights under Article 1, § 2 of the Illinois Constitution. Applying the *LaSalle/ Sinclair* factors, *LaSalle National Bank v. County of Cook*, 12 Ill. 2d 40 (1957) and *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370 (1960), Judge Jones concluded "The plaintiff has met his burden of proof that the enactment

of the ordinance was arbitrary, unreasonable and capricious *and bears no substantial* relation to public health, safety or welfare, all of which constituted a denial of his right of substantive due process of law." (4/4/01 Memorandum Opinion and Order, pp. 10-11).

On March 26, 2001, Hanna filed his Petition for Attorney's Fees with the Circuit Court, and on May 4, 2001, he filed his Corrected Petition for Attorney's Fees. The City filed its Objections to Plaintiff's Petition for Attorney's Fees on May 9, 2001. On May 30, 2001, Hanna filed his Reply in Support of his Petition for Attorney's Fees.

ANALYSIS

The law is not in dispute over the requirements that a plaintiff must satisfy to be awarded fees under § 1988. In fact, the Illinois courts have stated those standards:

> " . . . we find that our State courts should award attorney fees under 42 U.S.C. sec. 1988 (1976) only in the following instances: (1) where Federal statutory or constitutional law is the basis for a decision in favor of a claimant, or (2) where Federal law remains intimately involved in the case until a settlement or consent decree is entered into."

Caputo v. City of Chicago, 113 Ill. App. 3d 45, 48 (1st Dist. 1983), cited in *City of Chicago v. Korshak*, 276 Ill. App. 3d 597, 608 (1st Dist. 1995).

In a case similar to the facts before this court, the Illinois Appellate Court provided a further understanding of these requirements in *City of Aurora v. Navar*, 210 Ill. App. 3d 126, 139-140 (2nd Dist. 1991):

> "It may be that plaintiffs are not required to specifically identify in their pleadings, or specifically rely upon, one of the provisions set forth in section 1988 in order to prevail on a motion for section 1988 attorney fees.

(*Americans United for Separation of Church & State v. School District* (6th Cir. 1987) 835 F.2d 627, 631.) It does not follow, however, that plaintiffs' pleadings and arguments need have no connection at all to the statutory provisions named in section 1988."

The extent of that connection was elaborated upon in *Americans United*, cited by the *Navar* court. The 6th Circuit stated:

> "The rule to be distilled from these decisions is that § 1988 is concerned with the substance of a prevailing party' action, rather than the form in which it is presented. The mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorney's fees if the pleadings and evidence do present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy, and this claim is related to the plaintiffs' ultimate success." 835 F.2d at 631.

Hanna argues that his state constitutional claim upon which he prevailed is a substantial Fourteenth Amendment claim of denial of substantive due process because the Illinois courts have held that the substantive due process rights under Article I, § 2 of the Illinois Constitution are the same due process rights guaranteed under the 14th Amendment to the United States Constitution. Hanna cites *Lewis E. v. Spagnolo*, 287 Ill. App. 3d 822, 833 (5th Dis. 1997) *aff'd in part, rev'd in part on other grounds*, 186 Ill. 2d 198, 227 (1999), for that proposition. Hanna relies on the language where the court states:

> "The Illinois guarantee of due process stands separate and independent from the federal guarantee of due process, but the Illinois provision offers at least the same level of due process protection as that provided by the United States Constitution, and our courts are free to find that the Illinois Constitution provides greater protection than does the federal constitution." 287 Ill. App. 3d at 833.

This court disagrees with Hanna's interpretation. The language in the *Spagnolo* case does not persuade this court that the court's finding that the City's zoning decision violated Hanna's Illinois constitutional rights under Article 1, § 2 should be construed as a violation of the Fourteenth Amendment of the United States Constitution. First, the appellate court in *Spagnolo* confirmed that the Illinois due process guarantee is separate and independent of the federal guarantee. Second, the appellate court said that the level of protection was the same, not that the rights were the same. Third, in *Spagnolo* the appellate court found as a matter of pleading that the elements alleged regarding the abhorrent conditions at the plaintiff's school could support the separate claims of violation of Illinois substantive due process and violation of federal substantive due process. No such test of the sufficiency of Hanna's claim of federal constitutional due process occurred in the instant case.

In fact, in the instant case Hanna avoided such a test of sufficiency. When the City moved to dismiss Hanna's federal claims in federal court based on federal case law that zoning cases did not raise federal issues, *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir.1994) and *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988), Hanna mooted the motion. Rather than challenging that case law in the federal court, Hanna instead filed an amended complaint withdrawing his federal claims and requesting the District Court to remand the remaining state constitutional claims to the state court.

Accordingly, this court finds that this court's decision finding that the City violated Hanna's state constitutional due process rights is not a decision finding a violation of any federal constitutional rights.

CONCLUSION

For the foregoing reasons, this Court holds that Hanna is not entitled to recover § 1988 attorney's fees because Hanna did not prevail on a federal constitutional claim when this court found against the City for violation of his state substantive due process right. Therefore, this Court denies Hanna's petition for attorney's fees.

Entered:_____

Judge Sophia H. Hall

Dated: July 18, 2001

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT,
CHANCERY DIVISION

No. 98 CH 1217

ALBERT C. HANNA

Plaintiff,

v.

THE CITY OF CHICAGO, a municipal corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

BEFORE Judge Sophia H. Hall

The parties have been before the court on an extended trial on Court II of the plaintiff's complaint in which he makes a facial attack on a zoning ordinance that downzoned an entire nine block area within which his property is located from R5 to R4. The court has heard many witnesses and has received approximately two hundred items into evidence. For reasons that follow, the court finds, concludes, holds and rules that the plaintiff has more than met his burden of showing that the ordinance is invalid.

On October 28, 1997, the Chicago City Council enacted an ordinance rezoning a nine-block area within Lincoln Park (The "Deming Environs") from R5 General Residence District to R4 General Residence District. The Deming Environs is generally bounded by the south side of Deming Place on the north, the alley west of Clark Street on the east, the north side of Fullerton Parkway on the south, and the west side of Orchard Street on the west, all within Chicago's 43rd Ward.

A public hearing before the City Council Committee on Zoning preceded approval of the rezoning ordinance by the City Council. The Zoning Committee hearing took place on February 20, 1997, at which time the Zoning Committee recommended approval to the full City Council. Among other individuals, Hanna himself testified at the Zoning Committee hearing.

The rezoning of the Deming Environs changed the density of dwelling units permitted on lots in the Deming Environs. Density is measured by the minimum lot area required for each dwelling unit. The R5 classification requires not less than 400 square feet of land for each dwelling unit, while the R4 classification requires not less than 1,000 square feet of land for each dwelling unit. The rezoning also changed the applicable floor area ratio in the Deming Environs. Floor area ratio ("FAR") refers to the ratio of the floor area of the building (exclusive of basements where less than half is above grade, storage, off-street parking, and attic space having headroom of less than seven feet, six inches) divided by the square footage of the lot. Under the R5 classification FAR may not exceed 2.2. Under the R4 classification, FAR may not exceed 1.2.

The practical function of the change in zoning from R5 to R4 is as follows: under an R5 classification, for any given property, the owner can build a physically larger building (i.e., a bulkier building) and a building containing more units (i.e., a denser building) than can be built on the same site under an R4 classification. For example, with respect to the plaintiff's property, under an R5 classification he would have been able to construct a nine-unit, six and one-half story, building, with a height ranging between 72 and 84 feet. Under the current R4 classification the plaintiff can only

construct a six-unit, four story, building, with a height of approximately 50 feet.[1]

Since 1965, the plaintiff, Albert C. Hanna, with his wife, Christine, have owned and lived in a single-family residence located at 541 West Deming Place, in the Deming Environs. The plaintiff's home is a Romanesque style three-story single-family home built in the 1890's. When they acquired the property in 1965, the area was zoned R6, but was down-zoned in 1986, to R5. Although the plaintiff has no current plans to redevelop the property, he challenges, on its face, the validity of the ordinance rezoning the entire nine-block area of the Deming Environs from R5 to R4. The court previously dismissed Count I alleging inverse condemnation for failure to state a claim. Count II asserts that the rezoning ordinance violates the plaintiff's right of substantive due process in that the ordinance "is wholly arbitrary, capricious and unreasonable, and has no substantial relationship to public health, safety or welfare. . . " (Complaint, Court II ¶ 22). Count III asserts that the ordinance violates the plaintiff's right of equal protection of the law "by treating his land differently than other similarly situated land. . ." (Complaint, Court III, ¶ 23). In his prayer for relief, the plaintiff seeks both preliminary and permanent injunctive relief, costs and fees. Although the plaintiff's prayer for relief requests:

> a preliminary and permanent order enjoining the City from classifying plaintiff's land as an R4 General Residence District, and applying an R4 classification to his land;

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[1] In March 2000, the City Council enacted a city-wide height limitation for new construction. The new height limitation is 45 feet in R5 districts and 38 feet in R4 districts. Over the City's objection, this court has determined that the newly enacted height limitation is legally and factually irrelevant to its decision in this case because the correctness of the ordinance is to be measured as it existed at the time of its passage.

Plaintiff has consistently maintained in papers filed in this case that he is challenging the entire ordinance, not merely the ordinance as applied to his property.

The court must weight the evidence in light of *La Salle National Bank v. County of Cook*, 12 Ill. 2d 40 (1957) and *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370 (1960). In deciding whether the ordinance is valid, courts consider the following factors: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of the value of the plaintiff's property promotes the health, safety, morals, or general welfare of the public; (4) the relative gain to the public compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; (6) the length of time the property has been vacant. . . (7) community need for the proposed use; and (8) the care with which the community has undertaken to plan its land use development. *Northern Trust Bank/Lake Forest, N.A. v. County of Lake*, 311 Ill. App. 3d 332, 336-37.

Although the City asserts that the majority of the residential property surrounding the Deming Environs is zoned R4, the court finds that one can reach this conclusion only through the tortuous inclusion of areas that are significantly separated from the Environs itself. While there are areas that are zoned R4, Hanna's view that the character of the Environs is "no character" is far more persuasive to the court. He convincingly describes the Environs as being a thorough mix of all types of buildings that conform to R6, R5 and R4, and the court so finds.

The City argues that the predominant type of building in the Deming Environs is the one, two or three-flat, common to R4 districts, and the most common type of building in the City's R4 districts is a three-flat. The City also argues that the predominant type of building in the Deming Environs is

the low-rise building common to R4 districts and that the density of buildings in the Deming Environs is consistent with the R4 classification. Finally, it is urged that the FAR of buildings in the Deming Environs is consistent with the R4 classification. Nevertheless, the court finds persuasive Hanna's evidence and argument that the near 50 per cent rate at which the number of buildings are rendered non-conforming by the reclassification is so excessive that the ordinance in question must fail. Accordingly, the court finds that the first factor weighs in favor of the plaintiff.

The plaintiff also prevails on the second factor, the extent to which property values are diminished by the particular zoning restrictions. This factor is usually not determinative because property is almost always worth more under the classification proposed by the plaintiff. Nevertheless, because the downzoning effectively reduces the options that the plaintiff has for his property, the court rejects the City's argument that the property is worth more in its present configuration under R4 than R5.

The third factor is the extent to which the destruction of the value of the plaintiff's property promotes the health, safety, morals, or general welfare of the public. This is often considered with the fourth factor, the relative gain to the public compared with the hardship imposed upon the individual property owner. Again, the plaintiff prevails, having effectively demonstrated the downzoning accomplishes no discernable benefit to the public. The City offers as a justification for the ordinance that the downzoning is a legitimate attempt to preserve architecturally and historically significant structures within the City in general and the Deming Environs in particular. The City strenuously reminds the court that between 75 and 80 percent of the buildings within the Environs are either architecturally or historically significant. The only other areas of the City with such a high a concentration of architecturally and historically significant buildings are

areas which have been designated as landmark districts. In fact, the Deming Environs are on the City's "short list" of areas the City proposes to designate as a landmark district. Notwithstanding the historical significance of the buildings within the Environs, the record is entirely bereft of any evidence that the preservation of historically or architecturally significant buildings was a consideration in the downzoning in question. The court finds that this justification for the downzoning is entirely pretextual. If the City had been truly interested in conservation of such structures, that ought to have been accomplished by the landmark processes that are in place for that purpose. The court finds the City's assertion, regarding the relative ease with which downzoning can be accomplished over the apparently more onerous landmark process, entirely unpersuasive. Indeed, property owners—such as the plaintiff—who are entitled to rely upon the zoning of the property when they acquired it ought to be afforded the protections of the landmark process that the City here seeks to avoid.

The City also asserts that the downzoning served the purpose of protecting the scale of existing buildings from teardowns of many structures, urged to have been a trend in the Deming Environs. This argument is also rejected. Although thirty-eight buildings located within the Park West Community Association boundaries were torn down and replaced with newer buildings since 1993, only two were within the Deming Environs, one of which was included in the City's *Historic Resources Survey* (City Ex. DD). These latter two buildings were replaced by the *Stonegate* building at 615 Deming, the only new building constructed in the Deming Environs under the R5 classification between 1986 and 1996. All of the other teardowns occurred outside of the Environs, and the City offers no evidence to show the condition of the buildings that were torn down and replaced by different structures.

Finally with respect to the third and fourth factors, the court rejects the City's argument that a proliferation of *Stonegate*-type buildings, frequently referred to as "four plus ones," would alter the character of the neighborhood. The court sees no evidence of any such proliferation, and, in any event, the court is persuaded that the neighborhood is most fairly characterized as being of entirely mixed character.

The fifth factor, the suitability of the subject property for the zoned purposes, is of little importance. The plaintiff's home is clearly suitable for R6, as he originally purchased it, R5, to which the property was subsequently downzoned, and R4, the classification that he now contests. Because the sixth factor concerns the length of time the property has been vacant as zoned, it too is not applicable.

The plaintiff has prevailed on the seventh factor in that there was no community need for the proposed downzoning. Ordinarily, this factor relates to the use to which a *petitioning* owner intends to use property for which the owner is seeking a re-zoning. Here, however, the plaintiff has demonstrated that there is no community need for the downzoning here in question. In fact, the plaintiff has shown that the downzoning has disproportionately increased housing costs, causing an adverse impact on those of moderate means who live, or want to live in the Deming Environs and in Lincoln Park. This is consistent with Park West Community Association not having any tenants among its membership, and the Association not having sent notice of the downzoning effort to tenants.

The Deming downzoning was not a rezoning requested by the Department of Planning. The Park West Community Association ("PWCA") is a neighborhood community association that includes, within its borders, the Deming Environs. The PWCA represents the interest of the people that live in its boundaries and does not represent the City as a whole and was not concerned with whatever impact the Deming downzoning would have on the City as a whole. The PWCA

Planning Committee met monthly to discuss topics brought to it from the alderman, including land use and zoning issues. Judith Kahn Marohn, a resident within the Deming Environs, was Chairman of the PWCA Planning Committee during 1996-1997. In 1996-1997, there were approximately five to six people on the PWCA Planning Committee, of whom Marohn was the only Deming Environs resident. The PWCA Planning Committee considered the issue of supporting the proposed Deming downzoning. Marohn has no formal education in zoning or land-use issues. The PWCA Planning Committee did not have any members that were renters, or of African American or Hispanic descent.

The erection of the *Stonegate* building was one of the factors that motivated the PWCA to propose the downzoning of the Deming Environs. The PWCA did not want any more buildings built in the Deming Environs the size of *Stonegate*, the only new building built in the Deming Environs in the last 20 years. The concerns of the Planning Committee during the time period of 1996-1997 also included congestion and size and character of the buildings. According to Ald. Bernardini, the PWCA also expressed concern over increased traffic due to overbuilding and more building in the Deming area. The PWCA Planning Committee unanimously voted to support the proposed downzoning. The Deming downzoning was driven by the PWCA, particularly the Chairperson of its Planning Committee, Judith Kahn Marohn.

The record reflects no community-wide support. A February 7, 1997, memorandum written by Judith Kahn Marohn shows that two weeks before the City Council Zoning Committee meeting she was "curious" as to the community support for the downzoning, and wanted to know how large a support group the PWCA needed to "marshall [sic]" for the hearing. Although the City now contends the Deming downzoning was passed to preserve architectural character, citing a list of "historically significant" buildings in the

Deming Environs, nowhere in Ms. Marohn's letters to Ald. Bernardini, her neighbors, or to the Zoning Committee Chairman William Banks, did Ms. Marohn state that her, or the PWCA's, concern was to preserve the architectural significance of any buildings in the Deming Environs. In letters dated October 1, 1996 to Ald. Bernardini, February 5, 1997 to the neighbors, and February 20, 1997 to Chairman Banks, Ms. Marohn did not mention that the PWCA sought to preserve architecturally significant buildings. No one from the Deming Environs approached Ald. Bernardini with a list of buildings that the City had deemed architecturally significant nor did anyone express a need to preserve such buildings.

The court finds that there was no need to protect against overbuilding and excessive density. The *Stonegate* building was the only new building built in the Deming Environs in the last 20 years. The overall population of the Deming Environs had dropped 23% from 1950 to 1990. The population per household in the Deming Environs had held steady from 1960, when it was 1.4, to 1990, when it was 1.5 from 1980 to 1990, the total number of housing units in the Deming Environs decreased from 2,048 to 1,887.

The court also finds that there was no need to adopt a residential zoning classification of R4 to "preserve character and scale" when such a downzoning caused the percentage of non-conforming structures with respect to both FAR and minimum lot area to greatly exceed the 15% guideline established by Paul Woznicki and plaintiff's expert, George Kisiel. The Deming downzoning caused the percentage of non-conforming structures with respect to FAR to jump 29%, from 12% to 41% non-conforming, and with respect to minimum lot area to jump 9%, from 11% to 20% non-conforming. The evidence was that a total of 44% of the structures in the Deming Environs were made non-conforming or non-

conforming to a greater degree, by the downzoning from R5 to R4.

The record is virtually devoid of any support for the Deming downzoning from any resident of the Deming Environs, except Ms. Marohn. Based on the record, the only other support for the Deming downzoning came from other members of the PWCA, all of whom lived outside of the Deming Environs. The Deming downzoning was driven by the PWCA, particularly the Chairperson of its Planning Committee, Judith Kahn Marohn. Residents of the Deming Environs were not provided with notice that the proposed downzoning would be discussed by the PWCA Planning Committee on any date, and Hanna did not receive notice from the PWCA regarding any PWCA Planning Committee meetings pertaining to the downzoning. The PWCA sent letters signed by Ms. Marohn regarding the Deming downzoning to property owners but, significantly, not to renters who could well have found the downzoning objectionable. The PWCA sent several letters to Ald. Bernardini voicing its support of the Deming downzoning. When Ms. Marohn sent out her February 7, 1997 letter, she did not know how many people in the neighborhood were going to support the proposed downzoning. There was no referendum of the residents of the Deming Environs as to whether they supported the Deming downzoning.

The eight *La Salle* factor is the care with which the community has undertaken to plan its land use development. The most lenient characterization to be applied in this case is that the City rushed into an enactment solely at the behest of an interested citizen rather than to engage in any reasonable planning considerations. The entire downzoning effort began with the Park West Community Association, particularly with its leader, Judith Kahn Marohn. However, Ms. Marohn had no substantive conversations with anyone in the Chicago Department of Planning or Department of Zoning regarding

the proposed Deming downzoning. Despite its unanimous support for the Deming downzoning, and alleged concerns regarding density, congestion, and character of buildings, the PWCA Planning Committee never reviewed or analyzed any studies on the following issues pertaining to the Deming downzoning: (1) whether the number of housing units in the Deming Environs had increased or decreased in the last 20 years; (2) traffic problems in the area; (3) congestion resulting from pass-through traffic in the neighborhood; (4) possible population shifts in the Deming area; (5) potential impact on the labor pool that the Deming downzoning may have; (6) whether other downzonings in similar areas in Lincoln Park had reduced density; (7) the total value of the property that was being proposed for downzoning; (8) the impact on rents that the Deming downzoning may have; (9) the potential adverse impact on housing for minorities that the Deming downzoning may have; (10) the potential impact on housing for middle income working families who may live in the Deming Environs; and (11) the potential effect the Deming downzoning may have on encouraging conversion of rental apartments to condominiums.

Ald. Bernardini, the sponsor of the downzoning application and ordinance, relied on the PWCA recommendation in securing its passage. No studies or analyses were done by the alderman. Specifically, he did not consider the same issues that were not considered by PWCA or its planning committee. Zoning Administrator Paul Woznicki recommended that the downzoning should have been deferred for further study because more than 15% of the structures would become nonconforming to the R4 classification. Indeed, the rate of nonconformance approached 50%, the level at which he normally recommends that a downzoning application be denied. In this regard, the City argues that the testimony of the various witnesses demonstrates that the plaintiff's assertion of a 15% standard of non-conformity is meaningless. Although the City describes the process and non-binding nature of the

evaluative process involved, the evidence shows that the extremely high number of structures which were rendered non-complying was, in fact, never considered in the rush to passage. Accordingly, the court finds that the City did not use care in planning its land-use development of the Deming Environs, and that the eighth factor weighs in favor of the plaintiff.

The City of Chicago has, and had, no comprehensive plan for development. Although it is not unusual for a large, developed city to lack a formal comprehensive plan, the City's lack of such a plan renders its zoning decisions to become more subject to scrutiny and ". . . although not dispositive on the issue of validity, [citations], weakens substantially the presumption of validity which normally attaches to a zoning ordinance, especially after years of original zoning on which interested persons have come to depend." *Harris Trust & Savings Bank v. Duggan*, 105 Ill. App. 3d 839, 849 (1st Dist. 1982). In this regard, the City has consistently throughout the litigation, urged a "rational basis" test. The court finds that if a rational basis test is the standard, the enactment of the R4 classification was not rationally related to the City's goal of preserving the historic character and current scale of the existing neighborhood for the reason that the City had no such goals in the downzoning in question. Rather, the downzoning was accomplished at the insistence of a single resident of the Environs. Therefore, the R4 classification cannot possible meet the rational basis test.

However, as this court has written in its Memorandum Opinion and Order of December 6, 1999, Illinois courts do not apply the rational basis test to zoning cases, but rather the "substantial relationship" test. In this regard, the *LaSalle/ Sinclair* factors are the means used to determine the validity of the challenged zoning ordinance. *Northern Trust Bank/ Lake Forest*, 311 Ill. App. 3d at 336-37; *Zeitz*, 304 Ill. App. 3d at 594-95; *State Bank of Countryside*, 287 Ill. App. 3d at

912. Taking the factors together, this court finds that the *LaSalle/Sinclair* factors weigh against the enactment of the ordinance by which the Deming Environs was downzoned to the R4 classification. The downzoning of the Deming Environs was not passed for the public welfare or the public good, but was passed only in deference to the wishes of a few individuals. The plaintiff has met his burden of proof that the enactment of the ordinance was arbitrary, unreasonable and capricious and bears no substantial relation to public health, safety, or welfare, all of which constituted a denial of his right of substantive due process of law. Accordingly, this court finds the issues in favor of the plaintiff, Albert C. Hanna, and against the City of Chicago, and judgment is entered in his favor and against the City of Chicago on Court II of the Amended Complaint. The plaintiff has not presented evidence or argument tailored to support his equal protection claim, and therefore has failed to show that he has been deprived of equal protection of the laws, and judgment is entered against him and in favor of the City of Chicago on Court III.

So ordered.

_____, 2001

ENTER:

_____

Judge Judge's No. 189

APPENDIX E

Title 42 United States Code, Section 1988

Proceedings in Vindication of Civil Rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for

an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX F

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion

against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.